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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and CONAIR CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Act precludes issuance of a remedial bargaining order, in a "category one" case as defined by this Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575: *viz*, a case, like the instant one, in which from the inception of an organizing campaign—before the union has an opportunity to secure expressions of support from a majority of the employees in the bargaining unit—the employer commits "outrageous and pervasive unfair labor practices . . . [whose] effects cannot be eliminated by the application of traditional remedies [other than a bargaining order] with the result that a fair and reliable election cannot be had" (*Id.* at 613-614)?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Local 222, International Ladies' Garment Workers' Union, AFL-CIO hereby petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment in *Conair Corporation v. NLRB and ILGWU*, C.A.D.C. No. 82-1623.

OPINIONS BELOW

The decision and order of the National Labor Relations Board is reported at 261 N.L.R.B. No. 178 and is reprinted as Appendix C in a separately bound Appendix to this Petition (hereinafter "App."). The opinion and

judgment of the court of appeals are not yet reported and are reprinted as Appendices A and B.[1]

JURISDICTION

The opinion of the court of appeals was issed on November 15, 1983, and that court's judgment was issued on January 31, 1984. On February 10, 1984, Chief Justice Burger signed an order extending the time for filing a petition for a writ of certiorari to and including March 14, 1984. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides in pertinent part as follows:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that the person named in the complaint has engaged or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

STATEMENT OF THE CASE

Statement of Facts

This case arises out of six unfair labor practice charges filed with the National Labor Relations Board ("NLRB") by petitioner Local 222, International Ladies' Garment

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[1] The findings of fact in the Administrative Law Judge's 195 page decision serve only as background to the NLRB's 40 page decision and the court of appeals' 96 page decision, both of which detail the facts. As a result of the extraordinary length of the three decisions taken together, the ALJ's decision is not reprinted in the Appendix. Instead that decision has been photocopied and is being lodged with the Clerk of the Court.

Workers' Union ("ILGWU") against respondent Conair Corporation ("Conair") from April, 1977 to February, 1978. The facts, as found by the labor board and affirmed by the court of appeals, are as follows.

In March, 1977, the ILGWU began a campaign to organize Conair's production and maintenance employees. "Almost immediately thereafter [Conair's] officials embarked upon a course of conduct designed to intimidate and undermine its employees' support for the Union" (App. 119a). Specifically:

> [I]n early April Respondent [Conair] began holding a series of meetings with its employees in large and in small groups. . . . At these meetings and on numerous occasions, Respondent[] [Conair's] executive and lower ranking supervisors threatened employees with plant closure, discharge, and loss of benefits if they continued to support the Union. Respondent [Conair] also made numerous promises of increased or new benefits, solicited grievances, and made implied and explicit promises to remedy those grievances. In addition, Respondent [Conair] interrogated many of its employees about their union activities and created the impression that its employees' union activities were under surveillance. [*Id.* 119a-120a]

On April 11, 1977, the ILGWU, concerned over the number of employees who had expressed fear of being fired if they did not revoke their authorization to be represented by the union, commenced a strike to protest Conair's unlawful conduct; the strike engendered "substantial employee support" (*id.* 120a). "In response to the strike, [Conair] escalated its campaign of unfair labor practices" (*id.*). Specifically:

> Respondent [Conair] threatened to discharge strikers . . . because of their involvement in protected concerted activity. In addition, Respondent [Conair] repeated its threats of discharge and plant closure on a number of occasions during the course of the

> strike. Respondent [Conair] also interrogated employees about their union activities, and by interrogations, statements, and videotaping of the strike action, Respondent [Conair] created the impression that the employees' union activities were under surveillance. At the same time Respondent [Conair] offered increased benefits and better working conditions to nonstriking employees. When a number of strikers attempted to return to their jobs, Respondent [Conair] treated them as new employees and required them to sign papers waiving their Section 7 rights. The employees, however, refused to return to work under those unlawful conditions, and Respondent [Conair] again violated the Act by treating them as if they had abandoned their employment. [*Id.* 121a.]

In September, 1977, the strike ended and the strikers unconditionally requested reinstatement. In violation of law, Conair "instituted a discriminatory reinstatement policy," refusing reinstatement to some strikers and reinstating others as new employees with no seniority. (*Id.* 121a.)

In November, 1977, the NLRB conducted a representation election among Conair's employees. "As the election date neared, [Conair] intensified its unlawful activity." (*Id.* 122a.) Specifically:

> Respondent [Conair] continued to solicit grievances and implicitedly and explicitly promised to remedy those grievances. Respondent [Conair] also implemented better working conditions and made further promises of increased benefits. The number of its unlawful interrogations and threats also increased. For example, several weeks before the election, employees participating in Respondent[] [Conair's] profit-sharing plan were given a " 'Statement of Accounts' " with a message stamped on the front page which indicated that the profit sharing plan was not for union members. Finally, in an attempt not to leave anything to chance, posters and printed litera-

> ture indicating that union members would not receive a Christmas bonus and that if the Union won the election Respondent [Conair] would close the plant and move to Hong Kong were posted throughout the plant in work areas, the cafeteria, and hallways. [*Id.*]

Not surprisingly, the ILGWU was defeated in the representation election. Indeed, in contrast to its initial success in securing authorization cards in two weeks from 124 of the approximately 300 bargaining-unit employees, only 14 additional employees signed authorization cards thereafter. (ALJ op. at 8, 183 n.501.)

Proceedings Before the NLRB

The NLRB's General Counsel issued a consolidated complaint covering the ILGWU's six unfair labor practice charges. Hearings were held from March 23, 1978 to June 2, 1978, after which the ALJ issued an exhaustive opinion. The General Counsel, the ILGWU, and Conair all filed exceptions to portions of that decision.

On May 28, 1982, the NLRB issued its decision. The board found, in agreement with the ALJ, that Conair had "committed extensive unfair labor practices" which were "outrageous and pervasive." (App. 116a, 117a.) The board also found, again in agreement with the ALJ, that "those unfair labor practices . . . constituted objectionable conduct sufficient to warrant setting aside the election." (*Id.* 117a.) But the board concluded, contrary to the ALJ, that to remedy Conair's misdeeds it was appropriate to order Conair to bargain with the ILGWU.[2] In reaching this conclusion the board reasoned as follows:

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[2] The ALJ had understood the labor board's precedent as of the time he issued his decision to preclude the issuance of a bargaining order absent a card majority; it was for that reason that the ALJ denied such relief notwithstanding his finding that Conair's conduct had "render[ed] impossible a fair election." (ALJ op. at 184). As the board noted in its opinion, however, "[s]ubsequent to the

The NLRB first found, again in agreement with the ALJ's finding, that by its egregious misconduct Conair "has foreclosed any possibility of holding a fair representation election," and that no remedy, other than a bargaining order, could "effectively dissipate the lingering effects of [Conair's] massive and unrelenting coercive conduct." (*Id.* 124a-125a.) The board stressed "the extreme gravity of Respondent's violations" which "imparted in dramatic fashion the unmistakable message that loss of employment was the price to be exacted for the exercise of Section 7 rights" (*id.* 123a); the involvement of Conair's "highest executive officials" which "increas[ed] the likelihood that all employees would understand and credit any threats made" (*id.* 124a); the use of "mass communications . . . to insure maximum dissemination of unlawful threats" (*id.*); and the "timing of Respondent's unfair labor practices," including "swift and severe initial retaliation against the Union's organizational efforts, a lengthy campaign of unfair labor practices, an increase in violations as the election neared, and two unlawful discharges even after the election" (*id.*). The board therefore found, as a matter of fact, that "a fair and reliable election cannot be had." (*Id.* 117a.)

Having made that factual finding, the NLRB then considered the lawfulness of a bargaining order given that the ILGWU had obtained authorization cards from 46%, rather than a majority, of Conair's employees. The board concluded that a bargaining order is a lawful remedy in these circumstances:

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issuance of the Administrative Law Judge's decision in this case, the United States Court of Appeals for the Third Circuit . . . found that the Board possesses the authority to issue a nonmajority bargaining order in exceptional cases where a respondent's ' "outrageous" and "pervasive" ' unfair labor practices eliminated any reasonable possibility of holding a free and uncoerced election," and the board accepted the Third Circuit's decision. (App. 118a-119a, *citing United Dairy Farmers Cooperative Ass'n v. NLRB*, 633 F.2d 1054 (3d Cir. 1980), discussed at pp. 14-16, *infra*.)

[A] remedial bargaining order is the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization. Anything short of a bargaining order would deny employees that right which has been the hallmark of national labor policy for nearly five decades.

* * * *

[W]e find that the risk of imposing a minority union on employees for an interim remedial bargaining period is greatly outweighed by the risk that, without a bargaining order, all employees would be indefinitely denied their statutory right to make a fair determination whether they desire union representation.[3] " 'There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a decertification petition.' "

Whether or not we order bargaining, the employees . . . will have lost their right to select a bargaining representative by virtue of the employer's unfair labor practices. . . . [A] remedial bargaining order . . . best vindicates the employees' right of self-determination. No other remedy will as quickly and effectively provide the opportunity for employee free choice which the Act mandates us to protect. [*Id.* 125a, 127a-128a; citations omitted]

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[3] The NLRB noted that "the risk of even temporarily contravening the wishes of an employee majority" was reduced in this case as there was "a reasonable basis . . . for concluding that the Union would have enjoyed majority support but for Respondent's unfair labor practices." (*Id.* 128a.) Recognizing that it could not "predict[] with total certainty the outcome of the Union's organizational campaign if Respondent had not repeatedly and illegally interfered," (*id.* 126a), the board deemed it significant that "approximately 46 percent of the employees had at one time openly expressed their support for the Union by signing authorization cards" and that "[e]ven after bearing the brunt of Respondent's misconduct for nearly 9 months, approximately one-third of participating voters still cast ballots for the Union." (*Id.* 128a.)

The Decision of the Court of Appeals

Conair sought review of the NLRB's decision in the United States Court of Appeals for the District of Columbia Circuit. By a divided vote, that court refused enforcement of the bargaining order.

The court began its analysis by identifying the factual predicate "underl[ying] the Board's remedial directives" —*viz*, the labor board's finding that "a fair election could not be held in the wake of Conair's 'outrageous' and 'pervasive' violations of the NLRA." (App. 32a-33a.) The court concluded that "[t]he evidence credited in the administrative proceedings, and prior NLRB and court decisions, support [that] determination[]." (*Id.* at 33a.) But the majority concluded that the bargaining order was outside of the Board's authority:

> Our national labor relations policy is designed to "effectuat[e] ascertainable employee free choice" and "expressed" majority sentiment. A non-majority bargaining order departs from this design. Absent a union election victory or some other concrete manifestation of majority assent to union representation, it is impossible to project the employees' choice reliably; imposition of a bargaining order in these circumstances runs a high risk of opposing the majority's will. [*Id.* 55a-56a (citations omitted)]

Judge Wald dissented, stating the essence of her disagreement with the majority as follows:

> To invoke the principle of majority rule as an absolute bar to a bargaining order in cases of extreme coercion like this introduces into the Act an unjustified premise that the employees' right to reject collective bargaining is more important than their right to choose it, a premise Congress clearly did not endorse. To leave untouched, perhaps permanently, the negative fallout of an employer's successful cam-

paign to wipe out organizational activity means that the employees are indefinitely presumed to have rejected the union even when they have been prevented from exercising their free choice. To permit a Board order as temporary surrogate for their right to select a union representative, on the other hand, appears a far less drastic alternative, and more in keeping with the congressional policy of encouraging free choice and collective bargaining. [*Id.* 90a-91a (citations omitted)]

REASONS FOR GRANTING THE WRIT

The National Labor Relations Act grants workers the right to bargain collectively with their employers and, to further the free collective bargaining system, the Act establishes an election process through which workers may decide—without employer interference, restraint, or coercion—whether to organize. In this case, while the union was seeking but had not yet secured expressions of support from a majority of the employees in the bargaining unit the employer commenced a campaign of "outrageous and pervasive" unfair labor practices that has precluded its employees from making a free and uncoerced choice as to whether they desire union representation. The question presented here is whether in these circumstances the NLRA precludes a remedial bargaining order.

That question has precipitated a classic case calling for this Court's consideration. No aspect of federal labor policy has been more discussed than the board's authority to issue a bargaining order in situations like the instant one.[4] The decision below, holding unlawful

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[4] *See, e.g.*, Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 132-40 (1964); Golub, *The Propriety of Issuing Gissel Bargaining Orders Where the Union Has Never Attained a Majority*, 29 Labor Law. J. 631 (1978); Hunter, *Conair: Minority Bargaining Orders Usher in 1984 at NLRB*, 33 Lab. L.J. 571

such bargaining orders, is inconsistent with this Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The decision below squarely conflicts with the decision of the Third Circuit in *United Dairy Farmers Cooperative Ass'n v. NLRB*, 633 F.2d 1054 (3d Cir. 1980). And the decision below places severe restrictions on the remedial authority of the NLRB—restrictions that disserve the policies of the Act. For all these reasons this petition for a writ of certiorari should be granted.

I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN *NLRB v. GISSEL PACKING CO.*

The question whether the NLRA precludes a bargaining order where, as a result of an employer's "outrageous and pervasive" violations of the law, employees have been denied the opportunity to make a free and uncoerced choice as to whether they desire union representation is not *res nova* in this Court. That question was addressed in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), this Court's seminal decision on the scope of the board's authority to order bargaining, and the decision below is inconsistent with this Court's decision in *Gissel*.

(a) In *Gissel* this Court set forth "the factors that go into . . . a determination" of when "bargaining orders [are] appropriately entered." (*Id.* at 613.) The Court began as follows:

> Despite our reversal of the Fourth Circuit below in Nos. 573 and 691 on all major issues, the actual area

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(1982); Ostan, *Bargaining Orders: Gissel and United Dairy Farmers Revisited*, 8 Employee Rel. L.J. 198 (1982); Comment, *United Dairy Farmers Cooperative Association: NLRB Bargaining Orders in the Absence of a Clear Showing of a Pro-Union Majority*, 80 Colum. L. Rev. 840 (1980); Comment, *Employer Pre-Election Coercion: A Suggested Approach for Effective Remedial Action*, 115 U. Pa. L. Rev. 1112 (1967); Case Comment, 49 Geo. Wash. L. Rev. 780 (1981).

> of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order *without need of inquiry into majority status* on the basis of cards or otherwise, in *"exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had."* [*Id.* at 613-614 (emphasis added; citations omitted)]

Having thus defined its common ground with the Fourth Circuit, the Court in the very next paragraph of its opinion turned to its "area of disagreement" with that court:

> The only effect of our holding here is to approve the Board's use of the bargaining order *in less extraordinary cases marked by less pervasive practices* which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order *on a lesser showing of employer misconduct* is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; *in such a case*, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. [*Id.* at 614-15 (emphasis added)]

Gissel thus establishes that bargaining orders are appropriate in *two* categories of cases:

> *First*, where the employer has engaged in "'outrageous' and 'pervasive' unfair labor practices" which are "of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and

> reliable election cannot be had," a bargaining order is appropriate "*without need of inquiry into majority status*"; and
>
> *Second*, "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes," a bargaining order is warranted if the Board determines that "employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." [5]

(b) *Gissel* also rejects the very argument that the majority below embraced in overturning the board's bargaining order: that bargaining orders "needlessly prejudice[] employees § 7 rights" by denying an opportunity for self-determination through a board election. (*Id.* at 612.) The *Gissel* Court stated: "Such an argument ignores that a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct." (*Id.*):

> It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. Any effect will be minimal at best, however, for there "is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed." [*Id.* at 612-13 n.33 (citations omitted)]

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[5] *Gissel* also teaches that bargaining orders are not appropriate in a third category of cases: those involving "minor or less extensive unfair labor practices which, because of their minimal impact on the election machinery, will not sustain a bargaining order." 395 U.S. at 615.

The Court also noted that "[t]here is . . . nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition." (*Id.* at 613).[6]

(c) The court below acknowledged that *Gissel* "has been read to encompass cases with two characteristics: the employer's conduct falls into the most egregious category; the union's campaign at no point achieved a card majority." (App. 47a.) But the court of appeals dismissed the portion of *Gissel* that has been so read as merely "dictum, reciting Fourth Circuit dictum." (*Id.*)

Gissel cannot be so easily dismissed. To be sure, in each of the four cases decided by *Gissel* the union had at one time achieved a card majority. But the Court did not rely upon that fact in deciding all of those cases. Rather, in *Sinclair*, one of the consolidated cases, the Court stated:

> In *Sinclair*, No. 585, the Board made a finding, left undisturbed by the First Circuit, that the employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats. *The Board therefore did not have to make the determination called for in the intermediate situation above that the risks that a fair rerun election might not be possible were too great to disregard the desires of the employees already expressed through the cards.* [*Id.* at 615 (emphasis added)]

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[6] In concluding that a bargaining order does not offend the principle of majority rule, *Gissel* reaffirmed this Court's earlier decisions in *Franks Bros. Co. v. Labor Board*, 321 U.S. 702 (1944), and *Labor Board v. Katz*, 369 U.S. 736 (1962), in which the Court enforced bargaining orders even though at the time each order was enforced the union no longer was supported by a majority of the bargaining unit. (*See also Labor Board v. Bradford Dyeing Ass'n*, 310 U.S. 318 (1940); *Labor Board v. P. Lorillard Co.*, 314 U.S. 512 (1942).)

Thus the Court upheld the bargaining order in *Sinclair* by reference to its delineation, earlier in the opinion, of the two categories of cases in which bargaining orders may issue, and specifically by classifying *Sinclair* as a "category one" case in which bargaining could be mandated without "mak[ing] the determination called for in the [category two] situation" concerning the relative reliability of an election as compared to the signing of authorization cards as a gauge of majority sentiment.

In sum, while the *Gissel* cases could perhaps have been decided on the narrow ground that the unions there had achieved majorities at one time, that was not this Court's ground of decision. The decision below in the instant case is thus inconsistent with *Gissel's ratio decidendi* and warrants review on that ground.

II. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE THIRD CIRCUIT IN *UNITED DAIRY FARMERS COOPERATIVE ASS'N v. NLRB.*

As the court below expressly acknowledged (App. 41a-42a), its decision in this case is in square conflict with the decision of the Third Circuit in *United Dairy Farmers Cooperative Ass'n v. NLRB*, 633 F.2d 1054 (3d Cir. 1980).[7] This conflict provides an independent reason, sufficient in itself, for granting a writ of certiorari here.

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[7] As the court below also acknowledged (App. 42a n.74), its decision is inconsistent with dictum in decisions of several other courts of appeals. *See NLRB v. Empire Corp.*, 518 F.2d 860, 863 n.3 (6th Cir. 1975) ("[i]t is clear that the board may, where it finds egregious unfair labor practices, enter a bargaining order even though the union is unable to demonstrate that it represents a majority"); *NLRB v. Montgomery Ward & Co., Inc.*, 554 F.2d 996, 1002 (10th Cir. 1977) (*Gissel* "holds that the Board can issue a bargaining order if, in its discretion, it finds the unfair labor practices were so 'pervasive' and 'outrageous' that a bargaining order is the only remedy"); *J.P. Stevens & Co. v. NLRB*, 441 F.2d 514, 519 (5th Cir. 1971), *cert. denied*, 404 U.S. 880 ("even where a union has never demonstrated majority support in an appropriate unit, the

United Dairy was brought to the Third Circuit on a petition to review an NLRB decision declining to issue a bargaining order to a union which had not obtained authorization cards from a majority of employees in the bargaining unit. Two members of the board, while acknowledging the board's authority to issue a "non-majority" bargaining order in appropriate circumstances, had concluded that such an order was not warranted on the particular facts of that case (242 N.L.R.B. at 1027-30); two other members had disagreed with that factual analysis and had voted to issue a bargaining order (*id.* at 1031-38); and the fifth board member, Member Penello, had voted against issuing a bargaining order because in his view the NLRA barred the board from issuing a bargaining order absent a showing of a card majority (*id.* at 1038-43).

The Third Circuit's decision reversing the board began by recognizing that

> The failure of the Board to issue a bargaining order was predicated on the view expressed in the opinion of Member Penello that it lacked the authority to do so in the absence of a card majority or election victory. Since the choice of remedies ordered by the Board is predicated on this legal conclusion, we must consider it in further detail. [633 F.2d at 1064-65]

After considering Member Penello's legal conclusion "in detail," the Third Circuit rejected that conclusion as erroneous:

> [W]e hold that the Board has the remedial authority to issue a bargaining order in the absence of a card majority and election victory if the employer has committed such "outrageous" and "pervasive" unfair labor practices that there is no reasonable possibility

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Board may issue a bargaining order where the employer's unfair labor practices are so 'outrageous' and 'pervasive' that their ' "coercive effects cannot be eliminated by the application of traditional remedies" ' ").

that a free and uncoerced election could be held. [*Id.* at 1069] [8]

Here, of course, the court below reached precisely the opposite conclusion on the same legal issue: "[W]e hold that Congress has not empowered the board to issue a bargaining order absent a concrete manifestation of majority employee assent to union representation; we therefore decline to enforce the NLRB's bargaining order." (App. 4a.) This conflict among the circuits should be resolved by this Court.

III. THE DECISION BELOW PLACES SEVERE RESTRICTIONS ON THE REMEDIAL AUTHORITY OF THE NLRB.

Under section 10(c) of the NLRA, if the NLRB finds an employer guilty of an unfair labor practice, the board "shall issue . . . an order . . . requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter." This "power to command affirmative action," the Court has said, "is to be exercised as a means of removing or avoiding the consequences of a violation where those consequences are of a kind to thwart the purposes of the Act." *Edison Co. v. Labor Board*, 305 U.S. 197, 236 (1938). And, as the Court added in *National Licorice Co. v. Labor Board*, 309 U.S. 350, 364 (1940), the board's "duty [under § 10(c)] extend[s] . . . to the prevention of [an employer's] enjoyment of any advantage which he has gained by violation of the Act."

In two respects, the decision below constricts § 10(c) as elaborated by this Court to the point that the Act's

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[8] Based on this holding, the Third Circuit remanded *United Dairy* to the board "to consider in the first instance whether the facts in this case rise to the outrageous and pervasive conduct which sanctions the issuance of such bargaining orders." 633 F.2d at 1069.

purposes are thwarted and the wrongdoer gains the very unlawful advantage he sought.

First, the decision below makes the board powerless to "remov[e] or avoid[] the consequences of a violation" (*Edison Co., supra*) in precisely those cases in which it is most critical to do so: cases in which the employer has engaged in a campaign of outrageous and pervasive unfair labor practices. For the appellate court's construction of § 10(c) precludes the one remedy which, in the board's words, provides "the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization." (App. 125a.) "Such remedy simply allows the employees to learn through the only available route, the employer having unlawfully blocked the others, about the legitimate option the employer has foreclosed to them, so that after experiencing it for a reasonable time the employees then may make the free and reasoned choice the Act provides for them." (*United Dairy, supra*, 242 N.L.R.B. at 1038 (concurring opinion).)

Second, and equally important, the decision below makes it impossible for the NLRB to fulfill its "duty" to prevent an employer from "enjoy[ing] any advantage which he has gained by violation of the Act." (*National Licorice Co., supra.*) Under the court of appeals' interpretation of the Act, an employer which, through egregious wrongs, succeeds in denying its employees the right of free choice guaranteed by the Act is permitted to achieve its ultimate aim of avoiding collective bargaining. That decision thus invites employers to avoid bargaining by massive violations of the Act.

These profound consequences of the decision below provide a final ground, sufficient in itself, for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and CONAIR CORPORATION,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1623

CONAIR CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, INTERVENOR

Petition for Review of an Order of the National Labor Relations Board

---

Argued July 6, 1983

Decided November 15, 1983

Herbert Burstein for petitioner. *Randy Lewis Levine* and *David A. Kapelman* also entered appearances for petitioner.

Marjorie S. Gofreed, Attorney, National Labor Relations Board, with whom *Elliott Moore*, Deputy Associate General Counsel, National Labor Relations Board, was on the brief, for respondent. *Paul Spielberg*, Attorney, National Labor Relations Board, also entered an appearance for respondent.

Max Zimny, with whom *Jesse H. Strauss*, *Sidney Reitman*, *Bennet D. Zurofsky*, *Laurence Gold*, and *David M. Silberman*, were on the brief, for intervenor.

Carl L. Taylor and *Stephen A. Bokat* were on the brief for the Chamber of Commerce of the United States, *amicus curiae* urging that the order be set aside.

Gerard C. Smetana was on the brief for the Council on Labor Law Equality, *amicus curiae* urging that the order be set aside.

Michael E. Avakian was on the brief for Center on National Labor Policy, *amicus curiae* urging that the order be set aside.

Before: WALD, GINSBURG, and SCALIA, *Circuit Judges*.

Opinion for the Court in parts I-V.B filed by *Circuit Judge* GINSBURG.

Opinion for the Court in part V.C filed by *Circuit Judge* WALD.

Dissenting opinion filed by *Circuit Judge* WALD.

Dissenting opinion filed by *Circuit Judge* GINSBURG.

Separate concurring statement filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: This case presents a controversial question in federal labor relations law. Centrally at issue is the scope of authority Congress accorded the National Labor Relations Board (NLRB or Board) under the National Labor Relations Act (NLRA or Act) to issue a bargaining order when an employer has committed " 'outrageous' and 'pervasive' unfair labor practices . . . of 'such a nature that their coercive effects cannot be eliminated by the application of traditional

remedies, with the result that a fair and reliable [representation] election cannot be had.' "[1] The Supreme Court so described a category of cases in *NLRB v. Gissel Packing Co.*, and thereby opened the question whether a bargaining order might issue to redress the employer's grave misconduct even though the union involved never received authorization cards from a majority of the bargaining unit employees and lost a representation election.[2] We confront here the situation the Supreme Court described but did not decide in *Gissel*: the employer engaged in "outrageous" and "pervasive" unfair labor practices; the union never achieved a card majority, it did not otherwise demonstrate majority support, and it lost the representation election; the NLRB, in a three to two decision, issued a bargaining order.

On December 7, 1977, Local 222 of the International Ladies' Garment Workers' Union (Union) lost a representation election among the production and maintenance employees of Conair Corporation (Conair or Company). Joint Appendix (J.A.) 583a-84a. In administrative proceedings brought by the Board's General Counsel to set aside the results of the election and to remedy the Company's unfair labor practices, an Administrative Law Judge (ALJ) found that Conair had engaged in "outrageous" and "pervasive" unfair labor practices. *Conair Corp.*, 261 NLRB 1189, 1285 (1982). The ALJ's proposed order directed Conair to implement extraordinary notice and access remedies, including a requirement that Conair's president personally read the NLRB's remedial notice to an assemblage of the company's employees. The ALJ declined to recommend a bargaining order, however, because the union never obtained authorization cards from a majority of the bargaining unit employees. *Id.* at 1284-85 & n.451 (noting that the NLRB had not yet issued a bargaining order absent a card majority).

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[1] NLRB v. Gissel Packing Co., 395 U.S. 575, 613-14 (1969).

[2] *See id.*

The Board affirmed the ALJ's findings of fact, amending them only to include a finding that Conair had actually discharged its striking employees on April 22, 1977. *Id.* at 1189-90. Adopting the notice and access remedies proposed by the ALJ, the Board further ruled that Conair's "massive and unrelenting coercive conduct" warranted imposition of a bargaining order. *Id.* at 1192-94.[3] Conair has challenged the NLRB's decision.

We conclude that Conair did not receive fair notice of, and opportunity to respond to, a claim that it actually discharged striking employees on April 22, 1977; we therefore decline to enforce the Board's order in that particular. On the central issue, we hold that Congress has not empowered the Board to issue a bargaining order absent a concrete manifestation of majority employee assent to union representation; we therefore decline to enforce the NLRB's bargaining order. In all other respects, we deny Conair's petition for review and grant the Board's cross-petition for enforcement of its order.

On two issues, the panel is divided: (1) the NLRB's authority to issue a nonmajority bargaining order; and (2) the requirement that Conair's president personally read the NLRB's remedial notice to an assemblage of employees. Judge Wald, for the reasons stated in her dissenting opinion, would enforce the Board's bargaining order. For the reasons stated in Part V.C of this opinion, written by Judge Wald, the court upholds the Board on the presidential reading issue. Judge Ginsburg dissents on this issue; she would allow Conair's president, if he so elects, to designate a responsible officer to read the remedial notice on his behalf.

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[3] Subsequent to the ALJ's decision, the Third Circuit held in United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054 (3d Cir. 1980), that the NLRB had the authority to issue a nonmajority bargaining order to remedy "outrageous" and "pervasive" employer unfair labor practices. The Board issued such an order on remand in that case. *See* United Dairy Farmers Coop. Ass'n, 257 NLRB 772 (1981).

I. BACKGROUND

Conair is engaged in the manufacture, sale, and distribution of hair care, personal grooming, and related products. At all times relevant to this controversy, Conair maintained its administrative offices, conducted warehousing and distributional operations, and produced electrical hair care appliances at the Company's facility in Edison, New Jersey. 261 NLRB at 1203-04.[4] When the events at issue occurred, the Edison plant employed 300 unit workers. *Id.* at 1285 n.451.[5] Most of these employees, it appears, were Spanish speaking. *Id.* at 1208 n.31, 1268 n.369.

In March of 1977,[6] the Union began an organizational campaign at Conair's Edison plant. *Id.* at 1205. In early April, shortly after becoming aware of the Union's campaign, the Company conducted a series of unprecedented management-employee meetings in direct response to the Union's efforts. *Id.* at 1262, 1265. Conair Vice-Presidents John Mayorek and Jerry Kampel held a meeting for all unit employees in the plant's cafeteria on April 4. *Id.* at

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[4] As set out *infra* pp. 20-22, we reject Conair's challenge to the credibility determinations and findings of fact made by the ALJ, and affirmed by the Board. We therefore summarize the ALJ's factfindings in this background statement. Citations to 261 NLRB in Part I refer to the ALJ's opinion, rather than the Board's opinion, unless otherwise indicated by the context.

[5] As described by the ALJ, the bargaining unit included:

> All production and maintenance employees including shipping and receiving employees, warehouse employees, truck drivers and janitorial maintenance employees . . . at [the] Edison plant, but excluding all office clerical employees, plant clerical employees, professional employees, guards and supervisors as defined in the [National Labor Relations] Act.

261 NLRB at 1259-60.

[6] All events described herein occurred during 1977, unless otherwise noted.

1205. At that meeting, Mayorek indicated that the Company knew of the organizational campaign. He then pointed out the benefits provided by the Company in the past, *id.* at 1205-08, cautioned that certain current benefits would be lost with unionization, *id.* at 1205-08, 1267,[7] and promised that in the future the Company would provide a variety of benefits—many directly responsive to employee complaints aired at the meeting. *Id.* at 1205-08, 1264 & n.351, 1272.[8] Mayorek further informed the employees that the Company had an "open-door" policy—previously unknown to most, if not all, employees—whereby they could bring grievances directly to managerial personnel.[9] This direct access to management also would be lost with unionization, he warned. *Id.* at 1205-08, 1262-63. Kampel reiterated much of what Mayorek said. *Id.* at 1208, 1267, 1272.[10]

On April 6, Conair President Leandro Rizzuto addressed a second mass meeting of unit employees held in the production area. His remarks tracked the earlier remarks of Mayorek and Kampel. President Rizzuto stated that

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[7] Mayorek stated that only nonunion employees could participate in Conair's profit sharing plan, and that the Union would provide a health insurance plan inferior to the plan Conair offered. 261 NLRB at 1268.

[8] Mayorek promised an improved wage and benefits package, the hiring of a bilingual personnel director to deal with worker complaints, installation of a new water fountain, and expansion of the cafeteria to provide hot and cold meals. *Id.* at 1272. All but the last of these promised benefits answered complaints employees expressed at the meeting. *Id.* at 1264 & n.351.

[9] The ALJ doubted that Conair had an "open-door" policy prior to the April 4 meeting. *Id.* at 1262-63.

[10] An interpreter translated Mayorek's and Kampel's remarks into Spanish. Conair similarly provided Spanish translations of the remarks made at the April 6 mass meeting described below. *Id.* at 1206, 1210.

he could not understand why the employees would want to unionize; he then recited current benefits, cautioned that unionization would result in the loss of certain benefits,[11] and promised various additional benefits in the future. *Id.* at 1210-12, 1267-68, 1273.[12] Rizzuto warned that if he had to pay the increased wages the Union would demand, he would go out of business. *Id.* at 1210-12, 1267-68. He also stressed that, without a union, employees were free to bring complaints directly to supervisory and managerial personnel; with a union, he said, someone would have to represent workers before management, resulting in delay. *Id.* at 1211-12, 1267-68.

Later that same day, Rizzuto, Mayorek and Kampel held several meetings with groups of ten to fifteen employees during which they again spoke of current and future benefits, and of the "open-door" policy. Rizzuto stated at the small group sessions that if a union came in, it would be cheaper to move to Hong Kong than to remain in Edison. *Id.* at 1214-15, 1268, 1273.[13] Kampel promised to deal with several employee complaints aired at these meetings. *Id.* at 1214-15, 1273.[14]

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[11] These included the profit sharing plan and Christmas parties and gifts. *Id.* at 1267-68.

[12] In addition to the benefits promised on April 4, *see supra* note 8, Rizzuto promised that the security guard's negative attitude toward the employees, of which they had complained, would change. *Id.* at 1273.

[13] At the time Rizzuto spoke of moving, Conair already participated as a joint venturer in a Honk Kong production facility for electrical hair care appliances. *Id.* at 1204.

[14] Kampel promised to provide gloves to protect assembly-line workers' hands and to investigate the allegedly unfair discharge of a worker. *Id.* at 1216, 1273.

In contacts with small groups or individual employees, various supervisory personnel reiterated points Conair officials had made at the early April meetings. *See id.* at 1267 (closing

In response to Conair's extraordinary management-employee meetings, the Union called an unfair labor practice strike on the morning of April 11. *Id.* at 1217, 1277.[15] Approximately 125-140 unit employees participated in the strike that morning,[16] and over 100 remained at the plant to picket. *Id.* at 1218, 1277. The strike continued for over five months, ending on September 23. Disorganized picketing and numerous spontaneous acts of picket line violence[17] marked the first two days. *Id.* at 1219-26, 1287.[18] Thereafter, apart from a few incidents during

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of plant and moving to Hong Kong if Union comes in); *id.* at 1273 (promise of new wage package). Supervisory personnel also interrogated two employees about their union activities during this period. *Id.* at 1275.

[15] On April 6, 25-30 unit employees went to the Union hall to report on the various meetings. Some of these employees asked for return of their authorization cards, stating that they did not want to lose their jobs. The Union assured them that Conair's actions had been illegal and the next day told a meeting of 50-60 unit employees that they could strike to protest the Company's actions. Upon receiving an enthusiastic response from the assembled employees, and thereafter further exploring its options, the Union resolved to call the strike. *Id.* at 1217, 1277.

[16] Approximately 100 unit employees remained away from work and participated in picketing during the entire strike. *Id.* at 1217 n.73.

[17] These included rock and bottle throwing, tire slashing, name calling, threats against nonstriking workers, minor injuries to nonstrikers, damage to the nonstrikers' automobiles, and damage to plant property. *Id.* at 1287.

[18] On April 13, Conair secured a state court injunction (consented to by the Union, J.A. 306a) limiting the Union to a total of 10 pickets and forbidding the pickets from interfering with employees or vehicles seeking entry into or exit from the plant. J.A. 273a-75a. This injunction was vacated on May 16. J.A. 591a-92a. Conair obtained a second, similar injunction on July 21 that remained in effect until the end of the strike. J.A. 301a-03a, 319a-21a.

the week of July 18,[19] no significant picket line misconduct occurred. *Id.* at 1287.[20]

On April 13, the Union initiated two administrative actions: it petitioned the Board for certification as unit representative, J.A. 579a-80a;[21] and it filed an unfair labor practice charge against Conair based on the early April meetings. J.A. 271a-72a. The Union and the Company then entered into a stipulation to hold a consent election among all unit employees on Conair's payroll as of April 9. J.A. 581a-83a.[22] This election, originally scheduled for May 6, was postponed on May 5 pending

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[19] The primary incident occurred during the evening of July 21 when a Roadway Express driver arrived at the Conair plant in his personal vehicle and without any evident business purpose. A Union official struck the driver with a tire jack during an argument apparently over the picketers' previous treatment of another Roadway Express driver. 261 NLRB at 1232-36 & n.172.

During the course of the strike a series of fires occurred at the Edison plant and one night the windows of the executive offices were blown out by a shot-gun. No evidence established the Union's complicity in these acts, however. *Id.* at 1227 & n.133, 1287 & n.464.

[20] The ALJ based this finding in part on the extensive videotapes Conair made of the picketers from approximately April 13 or 14 until the end of the strike. *Id.* at 1276, 1287 n.465.

[21] As of April 13, at least 124 workers had signed cards authorizing the Union to "act exclusively as [their] agent and representative for the purpose of collective bargaining." *Id.* at 1205; J.A. 413a. The Union eventually obtained another 14 authorization cards. 261 NLRB at 1205.

[22] *See* NLRB Statements of Procedure, 29 C.F.R. § 101.19(b) (1983). The stipulation provided that Local 102, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters), which had intervened, would also be listed on the ballot. 261 NLRB at 1205; J.A. 581a-82a; *see* NLRB Casehandling Manual (Part II: Representation Proceedings) § 11022.3(d) (1975).

resolution of an unfair labor practice charge (based on the early picket line violence) the Company had filed with the Board on April 25. 261 NLRB at 1202 n.1; J.A. 280a-81a.[23]

During the course of the strike, the Company repeatedly made it clear to the striking employees that persistence in the concerted action would result in loss of their jobs. On April 20, Conair sent mailgrams to the strikers stating that they would be deemed to have quit their jobs unless they reported to work on April 22. 261 NLRB at 1237-38, 1268; J.A. 453a.[24] Conair subsequently sent each striker a letter dated June 9 which, in the Spanish version,[25] offered "full and immediate reinstatement . . . if you accept unconditionally our offer to return to work."

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[23] When an unfair labor practice charge that might affect the outcome of an election is filed shortly before the election and the NLRB finds that the charge has prima facie merit, the usual course is to postpone the election pending resolution of the charge or waiver by the charging party of its right to challenge the election on the basis of the charged conduct. *See* Suprenant Mfg. Co. v. Alpert, 318 F.2d 396, 397 (1st Cir. 1963).

[24] The mailgrams stated in full in both Spanish and English:

> WE HAVE CALLED YOU REPEATEDLY TO YOUR JOB. DESPITE YOUR PROMISES TO DO SO, YOU HAVE FAILED TO REPORT FOR DUTY. THERE IS NO VIOLENCE, EMPLOYEES FREELY ENTER THE PLANT. UNLESS YOU REPORT TO WORK ON FRIDAY APRIL 22 1977 AT YOUR REGULAR STARTING TIME YOU WILL BE DEEMED TO HAVE VOLUNTARILY QUIT YOUR JOB.

261 NLRB at 1237-38; J.A. 453a. The Union filed an unfair labor practice charge against Conair on May 19 alleging that the mailgrams threatened a discriminatory discharge and that the employees were so discharged as of April 22. J.A. 285a.

[25] The ALJ concluded that 75-80% of Conair's employees were Spanish speaking and noted that 79% of the 1977 strikers have Spanish surnames. 261 NLRB at 1268 n.369.

261 NLRB at 1238-39 & n.216, 1268; J.A. 452a.[26] Finally, Conair sent letters to the strikers in July or August stating in English and Spanish that the Company had notified the insurance carriers for the employees' medical and life insurance plans that the strikers no longer worked for Conair. 261 NLRB at 1239, 1268 & n.371; J.A. 484a.[27]

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[26] The letter stated in full in the Spanish version:

> OUR TELEGRAM OF APRIL 20, 1977, IS HEREBY RESCINDED. YOU ARE HEREBY OFFERED FULL AND IMMEDIATE REINSTATEMENT TO YOUR FORMER JOB OR, IF YOUR JOB NO LONGER EXISTS, TO A SUBSTANTIALLY EQUIVALENT POSITION, *IF YOU ACCEPT UNCONDITIONALLY OUR OFFER TO RETURN TO WORK.*

261 NLRB at 1238-39 & n.216; J.A. 452a (emphasis added). The English version replaced the italicized portion with "upon your unconditional offer to return to work." An employer has an obligation to reinstate unfair labor practice strikers who express their willingness to return to work. *See, e.g.*, Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956); Teamsters Local 115 v. NLRB, 640 F.2d 392, 394 (D.C. Cir.), *cert. denied*, 454 U.S. 837 (1981); Jimmy Dean Meat Co., 227 NLRB 1012, 1032 (1977).

[27] The letters stated in full in both Spanish and English:

> Dear Employee:
>
> You have been requested on two occasions within the last three months, to report to work and you have failed to do so. Under our medical and life insurance policies, "Cessation of active service in a class of employees eligible for insurance shall be deemed termination of employment." Consequently, we have advised the insurance companies that you are not working for Conair.
>
> You must also recognize that all accrued vacation benefits have been suspended and all forms will be mailed to you within 30 days.

261 NLRB at 1239; J.A. 484a. One insurance company sent the strikers letters notifying them that they were no longer

Meanwhile, inside the plant, the Company persisted in its efforts to eliminate unrest among its nonstriking employees.[28] Conair officials, both at meetings and in remarks to individual employees, continued to encourage workers to voice to management any grievances they might have. 261 NLRB at 1226, 1257 & n.371, 1262, 1265; J.A. 2328a. A bilingual personnel director, promised by Mayorek on April 4, commenced employment at the Edison plant on June 1. 261 NLRB at 1238. Thereafter, the Company planned and implemented a variety of benefits[29]—many in response to employee complaints raised during the early April meetings. *Id.* at 1246-48, 1274 & n.392.[30]

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covered because Conair had terminated their employment on the ground that they had "left [their] job[s]." 261 NLRB at 1239, 1268 & n.371.

[28] Throughout the strike Conair posted three large signs outside its plant stating in effect that Conair employees were not on strike. 261 NLRB at 1226, 1269. The ALJ concluded, in light of Conair's other actions, that these signs conveyed to the strikers the message that they were no longer considered by the Company as employees. *Id.* at 1269.

[29] On April 7, prior to the strike, Conair for the first time gave Easter gifts to its employees. *Id.* at 1216, 1274.

[30] Sometime between June 1 and the end of the strike the Company established a system for promoting current employees by bidding for jobs, *id.* at 1247; set up salary standards and performance ratings, *id.* at 1247-48; began a newsletter, *id.* at 1248; and allocated parking spaces by seniority, *id.* In addition, sometime between June 1 and the representation election, the Company expanded the cafeteria to provide hot food, *id.* at 1246-47; instituted formal termination and layoff procedures, *id.* at 1247; established an employee credit union, *id.* at 1248; organized employee social clubs, *id.*; improved safety procedures, *id.*; hired a bilingual nurse, *id.*; gave employees a holiday on their birthdays, *id.*; provided an extra drinking fountain in the production area, *id.* at 1274; and supplied gloves to the women on the assembly line, *id.*

Despite promises, Conair presented no new wage package during the strike or prior to the election. On numerous occa-

After a spring and summer of concerted action, the Union informed Conair that the strike would end on September 23; on behalf of all striking employees, the Union made an unconditional offer to return to work on that day. *Id.* at 1240, 1277. The Company accepted the offer but refused to reinstate the strikers immediately.[31] Instead, when the strikers reported to the plant on September 28, the Company required them to fill out job applications. *Id.* at 1240-41, 1278. During the period from October 4 to November 7, most of the strikers received reinstatement offers[32] and returned to work. *Id.* at 1241, 1279.[33] Conair initially offered five strikers jobs less desirable than the ones they held before the strike, however, and never offered reinstatement to thirteen strikers.[34]

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sions during the strike, Conair officials explained to the nonstriking employees that it would be illegal to offer such a package before Conair's labor problems were solved. *Id.* at 1226 & n.126, 1273.

[31] The Union responded to this refusal by filing another unfair labor practice charge. J.A. 341a-42a.

[32] Conair made the offers by means of a mailgram written in English only and mailed a scant one to four days prior to the date on which the employee had to report for work in order to accept. 261 NLRB at 1241, 1278.

[33] Upon returning to work, the strikers had to fill out new tax and insurance forms. The Company wrote "new hire" on many of the returning strikers' time cards and replaced the original date of hire on several strikers' attendance records with the return date. *Id.* at 1241-42, 1279.

[34] The Company refused to offer reinstatement to four employees who were arrested on the picket line and pled guilty to obstructing passage of a motor vehicle, *id.* at 1242-43, 1279-80, one employee who was arrested outside the plant and pled guilty to loitering, *id.* at 1242-43, 1281, and five employees who had responded to the June 9 letter but later rejoined the strike, *id.* at 1243-44, 1281. Conair mailed offers of reinstatement to two strikers at incorrect addresses, and failed to send an offer

On November 23, the Board approved a formal settlement of the unfair labor practice charges Conair had filed alleging picket line misconduct by the Union. J.A. 362a-66a.[35] The representation election initially scheduled for May 6 was thereafter rescheduled for December 7. 261 NLRB at 1202 n.1. During the two weeks prior to the vote, supervisory personnel repeatedly stated to various unit employees that Conair's president would close the Edison plant and move to Hong Kong if the Union won the election. *Id.* at 1248-51, 1269.[36] Supervisors also warned on several occasions that, in the event of a Union

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to one striker. When these errors were brought to Conair's attention, the Company refused to correct them. *Id.* Further, Conair discharged three reinstated strikers who had taken authorized leave. *Id.* at 1244-46, 1281-82. The Union filed unfair labor practice charges protesting these discharges. J.A. 367a-69a.

[35] This settlement required the Union to cease and desist from any further picket line misconduct and to post a notice of the settlement for 60 days. J.A. 364a.

Conair's original April 25 charge against the Union had been informally settled on May 12. J.A. 282a. The Board's Regional Director withdrew his prior approval of the settlement and issued a complaint on August 25, after the Company filed a second unfair labor practice charge alleging further Union violence. J.A. 322a-31a. The Union and the General Counsel reached a formal settlement on September 1, J.A. 332a-40a, but Conair objected because, inter alia, the Union did not admit guilt in the stipulation. J.A. 362a n.1.

[36] Supervisors had made similar statements to unit employees in October. 261 NLRB at 1248-49. Moreover, at a mass meeting for unit employees held on October 26, President Rizzuto warned that no company can give what the Union promised and still remain in business. *Id.* at 1271. Rizzuto also stated during the October 26 meeting that the Company could not spell out its future plans for improved benefits because the Union would object to the Board. *Id.* at 1273. Once again, he pointed to the Company's "open-door" policy. *Id.* at 1265.

victory, the employees would not receive their Christmas bonuses. *Id.* at 1250, 1253-54, 1270. "Raffle tickets" inundated the plant warning that a vote for the Union was a vote for plant closure. *Id.* at 1251-53, 1269-70.[37] Finally, Conair distributed campaign literature (printed in both Spanish and English, *id.* at 1254) and "Statements of Account" declaring that the Company's profit sharing plan was for nonunion employees only. *Id.* at 1254, 1270.

The Union lost the December 7 election by a vote of 136 to 69;[38] eight votes were cast for the Teamsters[39] and forty-one ballots were challenged. J.A. 583a-84a. On March 8, 1978, the Board's Regional Director filed a complaint in which he consolidated the Union's challenge to the election with allegations drawn from the various unfair labor practice charges the Union had filed against Conair. 261 NLRB at 1202 & n.2; J.A. 370a-93a.[40]

Hearings on the Regional Director's complaint ran for thirty-eight days, commencing on March 23, 1978, and ending on June 2, 1978. 261 NLRB at 1202 & n.4. On July 30, 1980, the ALJ issued his decision and recommended order. J.A. 260a. The ALJ determined that

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[37] These tickets stated in relevant part:

> WIN AN EXCITING ALL EXPENSE PAID TRIP TO CONAIR'S NEW FACILITIES IN BEAUTIFUL HONG KONG. DONATION: ONE UNION VOTE

Id. at 1251. There is evidence linking the Company to the distribution of these "raffle tickets." *Id.* at 1251, 1269-70.

[38] The electorate consisted of the 300 unit employees on Conair's payroll as of April 9. *Id.* at 1259-61, 1285 n.451.

[39] The Teamsters withdrew from the proceedings on December 19, 1977. J.A. 583a n.2.

[40] This complaint amended several prior complaints. *See* J.A. 286a-93a, 345a-61a, 370a-93a; *infra* pp. 25-27.

Conair had violated section 8(a)(1) of the NLRA [41] by soliciting employee grievances during an organizational campaign through means more elaborate than previously used and with the promise (expressed or implied) that reported grievances would be adjusted, 261 NLRB at 1266-67; by threatening its employees with loss of current benefits if they supported a union, *id.* at 1270-71; by threatening its employees with plant closure if they supported a union, *id.* at 1269-70; by threatening to discharge its employees for engaging in protected concerted action, *id.* at 1268-69; by promising (expressly or impliedly) and granting benefits to induce its employees to renounce unionization, *id.* at 1273-75; by coercively interrogating several employees concerning their union activities, *id.* at 1275-76; and by creating the impression that its employees' union activities were under surveillance, *id.* at 1276. *See id.* at 1288. The ALJ further determined that Conair's disadvantageous treatment of unfair labor practice strikers, based on their union activities, was unlawful under both section 8(a)(1) and section 8(a)(3) of the NLRA.[42] In this category of violations, the ALJ included the Company's failure to reinstate the strikers immediately upon their unconditional offer to return to work, *id.* at 1279; its failure initially to reinstate five strikers to positions substantially equivalent to their pre-strike jobs, *id.* at 1279; its failure ever to reinstate thirteen strikers, *id.* at 1281; and its discharge of three previously reinstated strikers, *id* at 1282. *See id.* at 1288. Conair's 8(a)(1) and 8(a)(3) violations, the ALJ concluded, were sufficiently grave and

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[41] Section 8(a)(1), 29 U.S.C. § 158(a)(1) (1976), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of rights the NLRA accords them.

[42] Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1976), bars encouraging or discouraging membership in any labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment."

numerous to place the Company's conduct within the "outrageous" and "pervasive" category described by the Supreme Court in *Gissel*. *Id.* at 1285.

The ALJ's recommended order directed Conair to cease and desist from the enumerated unfair labor practices and from violating section 8(a)(1) in any other manner,[43] and to implement extraordinary notice and access remedies. *Id.* at 1283, 1285.[44] The ALJ declined to recommend a bargaining order, however, because the Union never had obtained authorization cards from a

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[43] The ALJ's proposed order called upon the Company to reinstate with back pay all strikers refused reinstatement or initially recalled and later discharged. His order also awarded back pay to all strikers whose reinstatement was delayed. 261 NLRB at 1283; J.A. 263a-64a.

[44] These remedies required Conair to:

(1) Mail a notice of the remedial order (in both Spanish and English) to all current and former employees, place the notice in appropriate company publications, and have President Rizzuto read the notice to all current employees;

(2) publish the notice in local newspapers for four weeks;

(3) for two years grant the Union reasonable access to plant bulletin boards, upon request;

(4) for two years grant the Union reasonable access to nonwork areas of the plant during the employee's nonwork time, upon request;

(5) supply the Union, upon a request made within one year, the names and addresses of current employees;

(6) for two years give the Union notice of any speeches made by the Company to its employees concerning unionization, and equal time and facilities to respond thereto; and

(7) for two years give the Union the right to deliver a 30-minute speech to the employees on working time prior to any Board election in which the Union will participate.

261 NLRB at 1285.

majority of the unit employees [45] and the Board, at the time of the ALJ's decision, had never issued a nonmajority bargaining order. *Id.* at 1284-85 & n.451.

The full Board generally affirmed the ALJ's findings and proposed remedies. *Id.* at 1189-92; *id.* at 1195 & n.28 (Chairman Van de Water); *id.* at 1199 (Member Hunter).[46] By a divided vote, the Board also imposed a bargaining order retroactive to April 4, 1977—the date Conair began its campaign of unfair labor practices. *Id.* at 1192-94.[47] Finally, the Board majority concluded that the April 20 mailgram resulted in the actual discharge of the striking employees on April 22—and thus Conair was liable for back pay to the strikers from that date until the end of the strike. *Id.* at 1189-90 & n.5.

II. Threshold Issues

Conair initially raises two objections and contends that each of them warrants a decision vacating the Board's order in its entirety. The Company argues first, that the timing of the representation election among

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[45] The Union's 138 cards represented 46% of the 300 unit employees. *Id.* at 1285 n.451.

[46] Chairman Van de Water dissented from the Board's affirmation of the requirement that President Rizzuto himself read the remedial notice to the current employees. *Id.* at 1196 n.28.

[47] Three Board members voted to impose a bargaining order. Only two of these members, however, concluded that the order should be retroactive to April 4; one member of the majority voted that it be prospective only. *Id.* at 1194 & n.24. Two members who opposed the bargaining order in this case nonetheless believe that NLRB bargaining orders generally should be retroactive. We therefore accept NLRB counsel's representation to this court that the bargaining order the Board imposed on Conair is retroactive to April 4, 1977. *See* NLRB Response to the Court's Interrogatories and Supplemental Brief at 1-3 (August 5, 1983) (citing cases).

unit employees contravened NLRB policy and regulations; and second, that credibility assessments along with a host of other findings made by the ALJ, and adopted by the Board, lack foundation in the record. Both objections are insubstantial.

A. *Timing of the Representation Election*

On September 1, 1977, the Union and the Board's General Counsel reached a formal settlement of the unfair labor practice charges alleging picket line misconduct by the Union. J.A. 332a-40a. A term of the settlement required the Union to post a remedial notice at its offices for sixty days. J.A. 335a-36a. The Board approved this settlement, over Conair's objections, on November 23, 1977. J.A. 362a-65a. The representation election was then held on December 7, 1977. J.A. 583a.

The election occurred several weeks too soon, Conair maintains, because the Union's misconduct had destroyed "laboratory conditions," and the Board's own regulations indicate that such conditions could not be restored until expiration of the sixty-day posting period. We note first that it is not altogether clear that NLRB policy called for a sixty-day wait in this case. More importantly, the error, if there was one, was harmless.

NLRB regulations do provide that, "except in exceptional circumstances, no *election* should be held until the posting period has expired." [48] But "exceptional cir-

[48] The relevant regulation states that, upon the settlement of unfair labor practice charges blocking an election, the processing of the election petition may proceed. "However, except in exceptional circumstances, no *election* should be held until the posting period has expired" unless the charging party waives its right to challenge the election on the ground that the posting period had not expired. NLRB Casehandling Manual (Part II: Representation Proceedings) § 11730.8 (1975) (emphasis in original). Conair never executed a waiver. Opening Brief of Petitioner and Cross-Respondent at 32.

cumstances" may be present here. Almost all of the Union's misconduct occurred on April 11 and 12, 1977—eight months prior to the December 7, 1977 election date. 261 NLRB at 1219-26, 1287 (ALJ Opinion). The remaining incidents of misconduct occurred during the week of July 18, 1977—four and one-half months prior to the election. *Id.* at 1287. Moreover, the strike ended on September 23, 1977; there had not even been a picket line for two and one-half months prior to the election. *See id.* at 1240, 1277-78. It would not have been unreasonable, under these circumstances, for the NLRB to conclude that any effects of the Union's picket line misconduct had dissipated prior to December 7, 1977.[49]

In any event, Conair's argument fails on a practical ground. We do not comprehend how a Board-held election arguably tainted by Union misconduct harmed Conair when the Union lost that election. Thus, even if the NLRB should have deferred the election date until sixty days after the Union posted the remedial notice, Conair is not positioned to complain. Scheduling the election during the period the *Union* was required to post a cease and desist notice did not reduce the force of the *Company's* unfair labor practices at which the Board's order is directed.

B. *Substantial Evidence Supports the ALJ's Findings*

Conair's attack on the ALJ's findings do not merit extended discussion. The Company insistently urges that we overturn the ALJ's credibility determinations. Our review of the record confirms that we have no cause to do so.

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[49] An agency, of course, should observe its own regulations, *see, e.g.*, Gardner v. FCC, 530 F.2d 1086, 1089 (D.C. Cir. 1976), and the cloudy position of the NLRB on the election-timing issue suggests that the Board's rules on holding elections during posting periods or while charges are outstanding bear clarification.

The ALJ stated that, in general, he credited the testimony of the General Counsel's witnesses over the testimony of the Company's witnesses. *Id.* at 1265.[50] There is nothing inherently arbitrary, we note, in believing one side's witnesses and not the other's. *See Bruce Duncan Co. v. NLRB*, 590 F.2d 1304, 1309 (4th Cir. 1979); *cf. UAW v. NLRB*, 455 F.2d 1357, 1368-69 & n.12 (D.C. Cir. 1971) (resolving all factual conflicts in favor of one party does not establish bias of ALJ).[51] We find no tenable basis for assigning to the ALJ's credibility calls in this case less weight than we generally accord such assessments. *See, e.g., Local Union No. 984, IBEW v. NLRB*, 697 F.2d 113, 117 (6th Cir. 1982); *NLRB v. Pace Oldsmobile, Inc.*, 681 F.2d 99, 100-01 (2d Cir. 1982). His appraisals are neither "hopelessly incredible" nor "self-contradictory." We therefore uphold them. *See, e.g., NLRB v. S.E. Nichols, Inc.*, 704 F.2d 921, 923 (6th Cir. 1983) (uphold unless "lack[ing] a rational basis"); *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983) (uphold unless "inherently unreasonable or self-contradictory"); *NLRB v. American Geri-Care, Inc.*, 697

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[50] The ALJ observed that the testimony of the General Counsel's witnesses was "in large measure given in a forthright manner, was more detailed, generally unequivocal and clear, corroborative and consistent in nature with each other, and most importantly apparently consistent with the other evidence present in the record"; the testimony of the Company's witnesses, on the other hand, was "for the most part contradictory, evasive, guarded and quite defensive, at times unclear and equivocal, and in some instances of such an incredible nature as to be unworthy of belief." 261 NLRB at 1255. *See id.* at 1266 & n.358 (additional reasons for not crediting testimony of Vice-President Mayorek).

[51] The charge that the ALJ without exception disbelieved Conair's witnesses is less than fully accurate. For example, in concluding that strikers engaged in misconduct during the first two days of the strike, the ALJ credited testimony of Company witnesses. *Compare id.* at 1218-19 & n.80 *with id.* at 1219-26.

F.2d 56, 60 (2d Cir. 1982) (uphold unless "hopelessly incredible"), *cert. denied*, 103 S. Ct. 1876 (1983); *Boston Mutual Life Insurance Co. v. NLRB*, 692 F.2d 169, 170 (1st Cir. 1982) (uphold unless beyond "the bounds of reason"); *see also Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 386-87 (D.C. Cir. 1972) (NLRB finding based on testimony of two witnesses, although contradicted by testimony of a third witness, affirmed because testimony relied on was not "hopelessly incredible").

Conair also contends that many of the ALJ's findings are not supported by substantial evidence because they ignore contrary evidence given by credited General Counsel witnesses. We have reviewed each of the examples cited by the Company [52] and reject Conair's contention. At most, Conair has an argument that in each case rational triers of fact might have drawn conflicting conclusions from the testimony. Under such circumstances, this court has no authority to upset the conclusions reached by the ALJ and the Board. *See, e.g., NLRB v. Concord Furniture Industries, Inc.*, 675 F.2d 426, 428 (1st Cir. 1982); *Kenworth Trucks, Inc. v. NLRB*, 580 F.2d 55, 59 (3rd Cir. 1978).[53]

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[52] *See* Opening Brief of Petitioner and Cross-Respondent at 47-50, 52-53 (examples a, b, d, e & k).

[53] For similar reasons we reject Conair's assertions that the ALJ mischaracterized credited evidence, *see* Opening Brief of Petitioner and Cross-Respondent at 46-47, 50-55 ("Wahler incident" and examples f, g, j & l), and reached conclusions based on insufficient evidence, *see id.* at 49, 52, 55-56 (examples c, h, m & n). *See* Midwest Regional Joint Bd., Amalgamated Clothing Workers v. NLRB, 564 F.2d 434, 438 (D.C. Cir. 1977) ("Our function is not to overturn the Board's choice between two equally plausible inferences from the facts if the choice is reasonable . . . .").

III. The April 20, 1977 Mailgram: Threatened or Actual Discharge

By a three to two vote, the Board held that one of the ALJ's conclusions of law did not reach far enough. The ALJ had determined that Conair's April 20, 1977, mailgram to striking employees *threatened* discharge in violation of section 8(a)(1) of the NLRA (hereafter, 8(a)(1)).[54] The Board's majority decided that the mailgram violated section 8(a)(3) of the NLRA (hereafter, 8(a)(3)) as well,[55] because it amounted to more than a threat; it in fact terminated the strikers' employment as of April 22, 1977.[56] We hold that Conair was not afforded timely

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[54] As earlier noted, § 8(a)(1), 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of rights the NLRA accords them.

[55] As earlier noted, § 8(a)(3), 29 U.S.C. § 158(a)(3), bars encouraging or discouraging membership in any labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment."

[56] Actual discharge of unfair labor practice strikers not only violates § 8(a)(1) by "interfer[ing] with, restrain[ing], or coerc[ing] employees" in the exercise of their right to engage in protected concerted activity, it also discourages union membership by "discriminati[ng] in regard to hire or tenure of employment" in violation of § 8(a)(3).

The Board's modification of the ALJ's decision dramatically increased Conair's back pay liability. The Union, by letter and mailgram dated September 21, 1977, notified Conair of the strikers' unconditional offer to return to work as of September 23, 1977. 261 NLRB at 1277-78 (ALJ Opinion). A company has a five-day period to reinstate nondischarged unfair labor practice strikers once an unconditional offer to return is made. *See* Drug Package Co., 228 NLRB 108, 113-14 (1977). The ALJ therefore concluded Conair violated § 8(a)(1) and § 8(a)(3) when, five days after the unconditional offer was made (September 26, 1977), the Company had not reinstated anyone. 261 NLRB at 1279 (ALJ Opinion). Eighty-one strikers were reinstated from October 4, 1977 to

notice that the issue presented by the mailgram was actual, not merely threatened, discharge. Accordingly, we reverse the Board's determination that the mailgram episode violated 8(a)(3).

A. *Background*

On April 20, 1977, Conair sent a mailgram to each of its striking employees, stating in both English and Spanish:

> WE HAVE CALLED YOU REPEATEDLY TO RETURN TO YOUR JOB. DESPITE YOUR PROMISES TO DO SO, YOU HAVE FAILED TO REPORT FOR DUTY. THERE IS NO VIOLENCE, EMPLOYEES FREELY ENTER THE PLANT. UNLESS YOU REPORT FOR WORK ON FRIDAY APRIL 22 1977 AT YOUR REGULAR STARTING TIME YOU WILL BE DEEMED TO HAVE VOLUNTARILY QUIT YOUR JOB.

J.A. 453a. No striking employees reported to work in response to this mailgram. *See* 261 NLRB at 1238 (ALJ Opinion). The Union asserted, in an unfair labor practice charge filed against Conair on May 19, 1977,[87] that

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November 7, 1977. The ALJ's proposed order required Conair to make whole those striking employees for wages lost during the period from September 26, 1977, to "the date of a bona fide offer of reinstatement by [Conair], or their actual reinstatement as the case may be." *Id.* at 1283.

Actually discharged unfair labor practice strikers, however, are entitled to back pay from the date of discharge—even absent an unconditional offer on their part to return to work. *See* Abilities and Goodwill, Inc., 241 NLRB 27, 27-28 (1979). The Board's modification of the ALJ's decision therefore moved the date when the back pay obligation commenced from September 26, 1977, to April 22, 1977. Thus the Board's order adds over five months to Conair's back pay obligation to each unfair labor practice striker.

[87] The Union filed six separate unfair labor practice charges against Conair during and shortly after its organizing campaign. The first charge, Case No. 22-CA-7586, was filed on

the mailgram episode violated 8(a)(1) and 8(a)(3). J.A. 285a. Specifically, the Union charged:

> On or about April 20, 1977, and continuing to date, [Conair], by its officers and agents, *threatened its employees with discharge, and on April 22 discharged said employees*, because of their activities on behalf of Local 222, ILGWU, . . . and for their protected concerted activities. The foregoing employees consisted of those employees who have supported and are supporting the strike called by Local 222.

J.A. 285a (emphasis added).

The first official unfair labor practice complaint was lodged against Conair by the Board's Regional Director on May 31, 1977.[58] It covered unfair labor practices

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April 13, 1977. J.A. 271a-72a. On the same day, the Union also filed a petition for certification of representation in Case No. 22-RC-7119. J.A. 579a-80a. The second charge, Case No. 22-CA-7672, involving the mailgram allegation, was filed on May 19, 1977. J.A. 285a. The NLRB Regional Director's initial complaint, filed on May 31, 1977, alleged only those violations contained in the first charge by the Union. *See* J.A. 286a-93a.

The Union filed the third charge in Case No. 22-CA-7939 on September 29, 1977, J.A. 341a-42a; the Acting Regional Director's first amended complaint, filed on November 11, 1977, consolidated the first three Union charges and, for the first time, contained allegations about the mailgram controversy. *See* J.A. 345a-61a. Three additional charges, in Case Nos. 22-CA-8173, 22-CA-8220, and 22-CA-8238, were filed by the Union on January 26, February 21, and February 24, 1978, respectively. J.A. 367a-69a. The Regional Director's second amended complaint, issued March 8, 1978, consolidated the six charges and the representation petition for hearing. J.A. 370a-93a.

[58] The General Counsel is authorized by § 3(d) of the NLRA, 29 U.S.C. § 153(d), to file unfair labor practice complaints. The Regional Director, as agent for the Board in a particular region, 29 C.F.R. § 102.5 (1983), has authority to issue complaints where it appears an unfair labor practice

charged by the Union prior to May 19, 1977, and therefore did not include any reference to the mailgram. A statement concerning the mailgram episode appeared, initially, in the Acting Regional Director's first amended complaint aginst Conair, issued on November 11, 1977. J.A. 345a-61a. That pleading alleged: "On or about April 20, 1977, at its Edison plant, [Conair] did *threaten its employees with loss of employment* if they continued to support the Union or any other labor organization." J.A. 350a (emphasis added).

Notably, the Acting Regional Director's pleading did not incorporate the Union's charge that employees were in fact discharged by reason of the mailgram. Matching its confinement of the allegation to "threaten[ed] . . . loss of employment," the first amended complaint cited only 8(a)(1), not 8(a)(3), in this context. J.A. 360a. As to other unfair labor practices identified in the pleading, however, the complaint asserted that both provisions, 8(a)(1) and 8(a)(3), had been violated. *See* J.A. 353a-58a, 360a.

A second amended complaint issued on March 8, 1978. J.A. 370a-93a. It added new allegations, *see, e.g.*, J.A. 376a, 385a-86a, but repeated verbatim the mailgram charge as set out in the first amended complaint. J.A. 377a. Again, the pleading stated that the mailgram incident violated 8(a)(1); no 8(a)(3) charge was asserted in relation to this incident. J.A. 391a. Further, as the ALJ noted, "at the commencement of the hearing [before the ALJ] and during the course thereof the second amended complaint was amended at various times by counsel for the General Counsel to include additional allegations of violations . . . by [Conair]." 261 NLRB at 1202. None of these further amendments to the second

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charge has merit. *See* 29 C.F.R. §§ 102.15, 102.74 (1983). If the Regional Director declines to file a complaint, the charging party may appeal this decision to the General Counsel. 29 C.F.R. § 102.19 (1983).

amended complaint alleged actual discharge of strikers in violation of 8(a)(3). *See* General Counsel Exhibit 1 (cc)-(hh).

At the hearing before the ALJ, Conair Vice-President Mayorek testified that he knew of no striking employees who returned to work in response to the April 20 mailgram, J.A. 1485a, and that as of April 22, 1977, the striking employees were considered "[t]o have voluntarily quit their jobs." J.A. 1486a. Referring to this testimony and to the content of the April 20 mailgram, the ALJ concluded that the mailgram expressly threatened discharge in violation of 8(a)(1). 261 NLRB at 1268. Nothing in the ALJ's comprehensive decision, issued in July 1980, however, indicates as an issue in controversy the question whether the April 20, 1977, mailgram occasioned actual discharges in violation of 8(a)(1) and 8(a)(3). By contrast, in instances where the complaint alleged conduct in violation of 8(a)(3), and the evidence supported the allegation, the ALJ concluded that 8(a)(3) had been violated. *See, e.g., id.* at 1278 n.417, 1279, 1281.

In exceptions to the ALJ's decision, the Board's General Counsel asserted that the Judge erred by:

> [f]ailing to find that [Conair] violated Section 8(a)(1) and (3) of the Act by discharging all of its unfair labor practice strikers as of April 22, 1977, and by failing to provide an appropriate remedy in connection therewith.

General Counsel's Exceptions to the Decision of the Administrative Law Judge at 2 (November 14, 1980).[59]

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[59] This exception first appeared in the record in the Counsel for the General Counsel's Memorandum in Opposition to the Proposed Settlement Agreement at 5, dated October 18, 1979. In September 1979, over a year after the hearing before the ALJ closed, Conair and the Union negotiated a settlement that included a provision stating that Conair would not be

The Union filed a similar exception, and specifically asserted that Conair should have been ordered "to make all of the [affected] unfair labor practice strikers . . . whole for any loss of pay commencing April 22, 1977 until the date of a bona fide offer of reinstatement." Charging Party's Exceptions to the Decision of the Administrative Law Judge at 2 (November 7, 1980).

The Board unanimously affirmed the ALJ's determination that the mailgram unlawfully threatened striking employees with discharge in violation of 8(a)(1). We agree that the record fully supports the ALJ's conclusion, and Conair does not seriously argue otherwise. Three of the Board's five members, however, further determined that the ALJ's conclusion should be augmented in line with the exception pressed by the General Counsel and the Union; these members cited record evidence supporting the contention "that the April 20 mailgram also violated Section 8(a)(3) and (1) of the Act by unlawfully terminating the striking employees." 261 NLRB at 1189-90.

Conair, in its brief responding to the General Counsel's and Union's exception, had objected that the pleadings failed to alert it to the presence of an actual termination issue stemming from the mailgram. The Board's majority declared as its answer to this lack of notice objection:

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liable for back pay. Opposing the settlement, the General Counsel stated his view that Conair owed the unfair labor practice strikers back pay from April 22, 1977, until their reinstatement. Ultimately, the settlement agreement collapsed.

The General Counsel's cryptic reference in October 1979 to the issue stated with precision in his November 1980 exceptions does not indicate timely notice to Conair; although the ALJ's opinion did not issue until July 1980, the hearing ended on June 2, 1978. Notice adequate to provide a fair opportunity to defend must occur before, not after, the record is closed.

> Although [Conair] asserts that it had no notice that the April 20 mailgram would be litigated as a violation of Sec. 8(a)(3), the complaint specifically alleges that the mailgram threatened employees with discharge in violation of Sec. 8(a)(1), and *other paragraphs of the complaint allege that other conduct by [Conair] violated Sec. 8(a)(3).* Further, in its exceptions, [Conair] argued that the law and the interpretation of the facts now in the record do not support the finding of a violation. [Conair] does not argue that it was precluded from adducing any exculpatory facts or that it would have altered its presentation of the case in any manner. Accordingly, we find no merit to [Conair's] contentions since the issue was fully litigated and all of the operative facts underlying the finding of a 8(a)(3) and (1) violation are present in the record.

261 NLRB at 1190 n.5 (citing *Southern Newspapers, Inc.*, 255 NLRB 154, 154 n.1 (1981)) (emphasis added).

Board Member Hunter, joined by Chairman Van de Water, dissented from the majority's extension of the ALJ's decision on the mailgram episode. They reasoned:

> [T]he discharge issue was initially raised in the [Union's] charge but was not alleged as an unfair labor practice in the [Regional Director's] complaint, [thus leading Conair] to believe that the discharge issue was not before the Board. Sec. 3(d) of the Act vests the authority to issue unfair labor practice complaints with the General Counsel, and in this case the General Counsel saw fit not to allege that the mailgram had violated the Act by unlawfully discharging [Conair's] striking employees. . . . [T]his is not the type of case where, during the hearing, the General Counsel discovers previously unavailable evidence indicating additional unfair labor practices. . . . [T]he General Counsel had long been aware of the existence of the mailgram. . . . [I]t is patently unfair to permit the General Counsel to raise the discharge issue at such a late stage, and

> after the record has been closed. . . .[W]e can only speculate as to how [Conair] might have changed its litigation strategy or presented its facts differently if the discharge issue, with its substantial backpay liability, had been timely raised. Once the record has been closed, and, if you will, all bets called, it is too late to raise the ante and attempt to collect additional chips.

261 NLRB at 1199 n.39.

B. *Analysis*

We agree with the dissenting Board members that the critical issue is not whether there is substantial evidence in the record indicating that the mailgram occasioned actual termination of the strikers' employment. That issue, we believe, should not have been reached by the Board, for Conair was never told before the hearing record closed that the stakes included liability for discharges effected on April 22, 1977. The Union opened the matter by charging that the mailgram episode spelled discharge, and not the mere threat of such action. But the complaint adjudicated by the ALJ, although amended in several particulars both before and during the course of the hearing, never asserted more than the threat of termination in violation of 8(a)(1). And the ALJ, who canvassed the case thoroughly in an extraordinarily detailed decision, apparently did not regard actual discharge as a matter fairly posed for resolution.

It will not do to assert, as the Board's majority did, that "other paragraphs of the complaint allege[d] that other conduct by [Conair] violated Sec. 8(a)(3)." 261 NLRB at 1190 n.5. If anything, such "other paragraphs" might have reinforced Conair's anticipation that it faced only an 8(a)(1), not an 8(a)(3), contention in relation to the mailgram. Nor do we believe it was Conair's burden to show that, had it been accorded due notice of an actual discharge claim based on the mailgram, it could

have "adduc[ed] . . . facts" or "altered its presentation" to defeat the claim. *See id.* Here, as in *McLean-Behm Steel Erectors, Inc. v. Occupational Safety and Health Review Commission*, 608 F.2d 580, 582 (5th Cir. 1979), "because the record . . . does not reveal uncontrovertibly that petitioner could not have prevailed in any defense to [the 8(a)(3)] charge, we find prejudice requiring reversal." [60]

We stress that we do not rest on the notion that the NLRB's General Counsel is rigidly bound by his initial statement of a complaint or even his successively amended pleadings. Rule 15(b) of the Federal Rules of Civil Procedure provides an apt analogy. Under Rule 15(b), pleadings can be amended to conform to the evidence, even after judgment, when "issues not raised [therein] are tried by express or implied consent of the parties." FED. R. CIV. P. 15(b). Indeed, formal amendment is unnecessary to preserve the result of a fair trial of an issue that the parties in fact have agreed to litigate. But it must be "clear that the parties understand exactly what the issues are when the proceedings are had." *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839, 842 (D.C. Cir. 1950).

Further, the presence of evidence in the record to support a charge unstated in a complaint or any amendment thereto does not mean the party against whom the charge is made had notice that the issue was being litigated. "[T]he introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the party who introduced the evidence was attempting to raise a new issue." *Cioffe v. Morris*, 676 F.2d 539, 542 (11th Cir. 1982) (quoting *International Harvester Credit Corp. v. East Coast Truck*, 547 F.2d 888, 890 (5th Cir. 1977)).

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[60] *See* Jimenez v. Tuna Vessel "Granada", 652 F.2d 415, 420 (5th Cir. 1981) ("[E]ach party is entitled to know what is being tried, or at least to the means to find out. Notice remains a first-reader element of procedural due process, and trial by ambush is no[t] . . . favored . . . .").

Because it is the "[a]ctuality of notice . . ., not the technicality, [that] govern[s]," *Kuhn v. Civil Aeronautics Board*, 183 F.2d at 842, pleading amendments may be tendered on appellate review. *See* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1494, at 476-78 (1971). But "if the record is incomplete or if it is uncertain whether the party opposing the motion to amend had notice of the unpleaded issue at the trial stage, the appellate court should render its decision in conformity with the issues relied upon by the lower court in reaching its judgment." *Id.* at 478.

It is at least uncertain whether Conair had fair notice or understood that the discharge issue was part of the case tendered to the ALJ. The ALJ, who did not even mention the issue in an otherwise exhaustive set of findings and conclusions, evidently did not perceive that the question had been tried "by express or implied consent." *See* FED. R. CIV. P. 15(b). Under the circumstances presented here, the Board, acting as an appellate body, should have "render[ed] its decision in conformity with the issue[]" as framed and resolved by the ALJ. *See* 6 C. WRIGHT & A. MILLER, *supra*, at 478. We conclude, for the reasons stated, that the Board erred in "finding that [Conair] violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging its striking employees on April 22, 1977," 261 NLRB at 1190, and in modifying the ALJ's proposed remedy to conform to that Board finding.

IV. CONAIR ENGAGED IN "OUTRAGEOUS" AND "PERVASIVE" UNFAIR LABOR PRACTICES NOT OFFSET BY UNION MISCONDUCT

Two determinations underlie the Board's remedial directives: first, a fair election could not be held in the wake of Conair's "outrageous" and "pervasive" violations

of the NLRA; second, the Union did not engage in sufficiently grave misconduct to preclude the issuance of any bargaining order that might otherwise be appropriate. The evidence credited in the administrative proceedings,[61] and prior NLRB and court decisions, support both determinations. Neither is vulnerable under the deferential standard of review we apply when the Board engages in a reasoned exercise of its expert judgment. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32, 615-16 (1969); *Amalgamated Clothing Workers v. NLRB*, 527 F.2d 803, 807 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 907 (1976).

A. *Conair's Conduct*

The ALJ concluded that "the extensive unfair labor practices committed by [Conair] . . . are so 'outrageous' and 'pervasive' as to . . . render[] impossible a fair election." 261 NLRB at 1285. The NLRB accepted the ALJ's conclusion[62] as congruent with the Board's analysis of Conair's conduct in terms of four variables: the gravity of the Company's violations, the extent to which their coercive effect pervaded the bargaining unit, their timing, and the degree to which Conair repeated them.[63]

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[61] *See supra* pp. 5-18.

[62] Member Hunter disagreed; in his opinion extraordinary notice and access provisions would provide an adequate remedy. 261 NLRB at 1199. Chairman Van de Water's position on this issue is unclear. *See id.* at 1195.

[63] These variables derive from the NLRB's decision in United Dairy Farmers Coop. Ass'n, 257 NLRB 772, 773-75 (1981) [hereafter, *United Dairy II*], the only other case in which the Board has ordered an employer to bargain with a union that never obtained even a card majority. *See* 261 NLRB at 1192 (Board Opinion). The *United Dairy II* decision also identified a history of employer misconduct as relevant to determining whether a fair election is possible. *See United Dairy II*, 257 NLRB at 773. The Board acknowledged the absence of evidence in the instant case that the Company engaged in unfair labor practices prior to the events at issue. *See* 261 NLRB at 1192 n.16.

The Board referred first to the gravely coercive nature of Conair's unfair labor practices, stressing the Company's threats to close the plant and its reprisals against striking employees. *Id.* at 1192.[64] Next, the Board noted that the Company's violations were constantly repeated. Further, the Board observed that the unlawful practices began at a high level of intensity shortly after the Union's organizational drive commenced, continued over an eight month period, intensified as the election neared, and even occurred several times after the election. *Id.* at 1193. Finally, the Board cited the conspicuous involvement of Conair's highest officials and the use of mass meetings and publications as factors serving to insure that the coercive impact pervaded the bargaining unit. *Id.* The confluence of factors thus identified by the Board is undergirded by substantial evidence on the record as a whole, *see, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Pedro's, Inc. v. NLRB*, 652 F.2d 1005, 1011 (D.C. Cir. 1981),[65] and adequately justifies the conclusion that Conair's conduct fell into the most egregious category.

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[64] The Board pointed to the threats to discharge the striking employees, the refusal to reinstate certain strikers, the delay in reinstating the other strikers, the subsequent discharge of several reinstated strikers, and the threats to close the plant as the most coercive of Conair's numerous violations. *See* 261 NLRB at 1192-93.

The Board majority also emphasized its determination that the April 20 mailgram resulted in the actual discharge of all striking employees on April 22. *See id.* at 1192. We have rejected that determination because it was made without fair notice to Conair. *See supra* pp. 23-32. We do not regard the "actual discharge" determination as critical, however, *cf.* Pedro's, Inc. v. NLRB, 652 F.2d 1005, 1011-12 (D.C. Cir. 1981), because the Board majority concluded in the alternative that Conair's conduct precluded a fair election even if the Company did not discharge all the striking employees on April 22. *See* 261 NLRB at 1193 n.18.

[65] *See supra* pp. 20-22 (ALJ's findings underlying the factors identified by the Board are supported by substantial evidence).

Prior NLRB and court decisions sustain the Board's judgment as to the character and impact of Conair's conduct. Precedent acknowledges the gravity of threats to close a plant. *See, e.g., Sinclair Co. v. NLRB*, 395 U.S. 575, 588-89, 611 n.31, 615 (1969) (threats of plant closure alone provide sufficient justification for majority bargaining order); *Donn Products, Inc. v. NLRB*, 613 F.2d 162, 166 (6th Cir.) (plant closure is one of the most coercive threats company can make during an election), *cert. denied*, 447 U.S. 906 (1980); *Chemvet Laboratories, Inc. v. NLRB*, 497 F.2d 445, 448 (8th Cir. 1974) (same); *Wright Plastic Products, Inc.*, 247 NLRB 635, 635 (1980) (same); *Rapid Manufacturing Co.*, 239 NLRB 465, 466 (1978) (same), *enforcement denied in part*, 612 F.2d 144 (3d Cir. 1979). Reprisals against union proponents are similarly recognized as highly coercive. *See, e.g., Jim Baker Trucking Co.*, 241 NLRB 121, 122 (1979) ("threat of termination is a serious unfair labor practice, [and] the effectuation of such a threat is even more serious"), *enforced mem.*, No. 79-7163 (9th Cir. Aug. 8, 1980); *cf. First Lakewood Associates v. NLRB*, 582 F.2d 416, 424 n.5 (7th Cir. 1978) (it is generally but not universally true that "section 8(a)(1) violations are less serious and have less residual impact than . . . section 8(a)(3) violations"). The numerosity of 8(a)(1) violations has figured prominently as well in estimating the coercive impact of an employer's unlawful anti-union activities. *See United Oil Manufacturing Co. v. NLRB*, 672 F.2d 1208, 1213 (3d Cir.), *cert. denied*, 103 S.Ct. 446 (1982); *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996, 1003 (10th Cir. 1977); *Jim Baker Trucking Co., supra*; *see also NLRB v. Ely's Foods, Inc.*, 656 F.2d 290 (8th Cir. 1981) (majority bargaining order upheld where employer committed only 8(a)(1) violations).

Case law further recognizes that the possibility of a fair rerun election is reduced when high corporate officials

participate in the unfair labor practices, *see, e.g., Rapid Manufacturing Co. v. NLRB*, 612 F.2d 144, 149 (3d Cir. 1979); *Wright Plastic Products, Inc.*, 247 NLRB 635, 635 (1980), and when the violations affect most of the unit employees. *See, e.g., Electrical Products Division of Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 987 (3d Cir.), *cert. denied*, 449 U.S. 871 (1980); *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996, 1003 (10th Cir. 1977). Repetition of unfair labor practices, practical judgment suggests, reinforces their coercive effect. *See also NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 601 (9th Cir. 1979) ("[r]epeated and drastic nature of the coercive behavior" warrants majority bargaining order as remedy), *cert. denied*, 445 U.S. 915 (1980).

Two additional considerations fortify our view that we have no cause in this case to second guess the NLRB's expert appraisal of the quality and effects of Conair's unlawful activities. First, this case in several respects is similar to the one other case in which the Board concluded a nonmajority bargaining order was necessary because an employer's "outrageous" and "pervasive" unfair labor practices precluded a fair return election (*United Dairy Farmers Cooperative Association*, 257 NLRB 722 (1981)),[66] and it is distinguishable from cases in which

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[66] *United Dairy II* differs from this case in that the employer there had a prior history of unfair labor practices, discharged over 20% of the bargaining unit (including the primary union activist), and even threatened physical violence on a single occasion. However, the two cases have these common features: in both, the company president (as well as others) repeatedly threatened discharges and plant closure; the company actually discharged employees, granted benefits, coercively interrogated employees, and created the impression of surveillance; the company responded swiftly and severely to the beginning of the unionization drive and continued committing unfair labor practices over an extended period; and in

the Board did not reach that conclusion.[67] *Cf. NLRB v. Jamaica Towing, Inc.*, 602 F.2d 1100, 1104-05 (2d Cir. 1979) (one reason for remand is Board's failure to explain apparent inconsistency of issuing a bargaining order when Board had not issued such an order in similar cases). Second, Conair's misconduct was more "outrageous" and "pervasive" than the misconduct demonstrated in other cases in which this court affirmed the Board's decision to issue a majority bargaining order because prospects for a fair rerun election appeared dim. *See Road Sprinkler Fitters Local Union No. 669 v. NLRB*,

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both cases the coercive message was effectively spread throughout the bargaining unit. Moreover, unlike the employer in *United Dairy II*, Conair also engaged in extensive solicitation of employee grievances, threatened to terminate a variety of employee benefits, and delayed reinstatement of unfair labor practice strikers. *Compare United Dairy II*, 257 NLRB at 772-74 *with* Part I, *supra* pp. 5-17.

The NLRB has found "outrageous" and "pervasive" employer misconduct in other cases. *See, e.g.*, Sambo's Restaurant, Inc., 247 NLRB 777, 777 (1980), *enforced*, 641 F.2d 794 (9th Cir. 1981). The Board decided these cases, however, when it did not yet claim the authority to issue nonmajority bargaining orders to remedy such conduct. Consequently, it is not clear that the Board analyzed the situations presented with the rigor necessary to determine whether a nonmajority bargaining order, if within the Board's remedial authority at all, is appropriate. *See* Lankford, *Nonmajority Bargaining Orders: A Study in Indecision*, 46 ALBANY L. REV. 363, 395 (1982).

[67] *See* Belcher Towing Co., 265 NLRB No. 159, slip op. (1982) (although company was a recidivist, there were no discharges, mass threats of discharge, or threats of plant closure; company president did not personally participate in unfair labor practices; unionization effort occasioned no immediate response; and fewer nondischarge § 8(a)(3) violations occurred); Paul Distributing Co., 264 NLRB No. 179, slip op. (1982) (although two of seven unit employees were discharged, company recalled union activist five days later; no threats were made to the unit en masse; and individual threats made three days after discovery of the unionization effort were not repeated thereafter); United Supermarkets,

681 F.2d 11, 24 (D.C. Cir. 1982) (no threats of plant closure, no threat of losing benefits, no solicitation of grievances, no promises or grants of benefits, fewer threats of discharge), *cert. denied*, 103 S.Ct. 831 (1983); *Amalgamated Clothing Workers v. NLRB*, 527 F.2d 803, 806-07 (D.C. Cir. 1975) (no 8(a)(3) violations, no threats of discharge, no solicitation of grievances, no interrogations, no impression of surveillance, no threat to withdraw benefits, fewer promises and grants of benefits), *cert. denied*, 426 U.S. 907 (1976); *Southwest Regional Joint Board, Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1034-35 (D.C. Cir. 1970) (no threats of plant closure, no threats of discharge, no solicitation of grievances, no impression of surveillance, no involvement by company president, fewer 8(a)(3) violations, fewer promises and grants of benefits, and fewer threats to withdraw benefits).[48]

B. *The Union's Misconduct*

It is not disputed that, on three days in the course of the five and one-half month long strike, significant episodes of striker violence occurred. Picketing was massive and disorganized on the opening days, April 11 and 12. Employees attempting to cross the picket line encountered pushing and shoving. Uncontrolled strikers threw rocks, obstructed traffic, slashed tires, and smashed windshields. Several workers sustained minor injuries. These chaotic

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Inc., 261 NLRB 1291 (1982) (unfair labor practices subsided several months prior to election; company did not communicate threats en masse; high level officials did not make threats; and geographical separation of bargaining unit members diffused coercive impact); Fred Lewis Carpets, Inc., 260 NLRB 843 (1982) (no solicitation of grievances, or surveillance; and company committed all violations on single day).

[48] This court also approved a majority bargaining order in Oil, Chemical & Atomic Workers Int'l Union v. NLRB, 445 F.2d 237, 246-47 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972), a case involving numerous and sustained highly coercive unlawful practices.

incidents, the ALJ found, were not Union-planned. *See* 261 NLRB at 1219-26, 1287 nn. 453, 456.

On the evening of July 21, the arrival of a truck at Conair's premises for no apparent business reason occasioned a further violent incident. The truck driver was assaulted and his truck was damaged. *See id.* at 1232-36.

The ALJ determined from the testimony that "victims" provoked some of the strikers' misconduct and that Conair's own unlawful activities created a "volatile situation." *See id.* at 1287 n.456. He further found that, following the chaotic first two days of the strike, violence subsided. *See id.* In the long stretch from April to September, the ALJ concluded, the "strike was generally conducted in a peaceful manner with no significant picket line misconduct." *Id.* at 1287.[69]

We do not decide in this case whether, as a general rule, grave union misconduct, even if offset by more egregious employer misconduct, precludes Board imposition of a remedial bargaining order. *Compare NLRB v. Triumph Curing Center*, 571 F.2d 462, 476 (9th Cir. 1978), *and Donovan v. NLRB*, 520 F.2d 1316, 1321 (2d Cir. 1975) (in deciding propriety of majority bargaining order Board should balance "effect of the Company's violations against the gravity of the Union's misconduct"), *cert. denied*, 423 U.S. 1053 (1976), *with* Note, *Union Violence & Bargaining Orders: A New Approach to* Laura Modes, 127 U. PA. L. REV. 1640, 1658-65 (1979) (advocating exclusive focus on gravity of union misconduct).[70] We address only the circumstances at

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[69] On review of the record, we concluded that substantial evidence supports the ALJ findings underlying these observations. *See supra* pp. 20-22.

[70] For the Board's five-factor balancing approach to the problem, see Maywood Plant of Grede Plastics, 235 NLRB 363, 365 (1978).

The Board has declined to issue majority bargaining orders when the union's misconduct was considerably more serious,

hand: when a strike is generally peaceful, marred only by outbursts of violence contained within a short span and not traced to union direction, we are not prepared to declare the Board's issuance of an otherwise appropriate bargaining order an abuse of discretion.

V. REMEDIES

For the reasons stated in Part III, *supra*, we decline to enforce the portion of the Board's "make whole" directives predicated upon the alleged discharge of strikers on

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and the employer's considerably less grave, than the misconduct demonstrated in this case. *See* Allou Distribs., Inc., 201 NLRB 47 (1973) (six union agents entered plant and then deliberately threatened and intimidated all ten unit employees until they withdrew decertification petition; employer violated § 8(a)(1) and § 8(a)(5) by soliciting decertification petition, promising improved benefits, and refusing to bargain); Aircraft Mantel & Fireplace Co., 174 NLRB 737 (1969) (union deliberately engaged in extended campaign of intimidation and property damage; employer violated § 8(a)(5) by refusing to bargain); Laura Modes Co., 144 NLRB 1592 (1963) (union representatives beat one partner inside plant, "pushed around" employee trying to call police, and on a later date beat another partner outside plant; employer violated § 8(a)(1) and § 8(a)(5) by coercively interrogating employees, threatening discharge, soliciting employees to withdraw from union, and refusing to bargain).

For court rulings refusing to enforce majority bargaining orders after union misconduct, see NLRB v. World Carpets, 463 F.2d 57 (2d Cir. 1972) (picketers threatened nonstrikers with sticks and chased plant managers in cars; low level supervisor on one occasion promised employees a benefit and on another stated that company president would close warehouse rather than accept union); NLRB v. United Mineral & Chemical Corp., 391 F.2d 829 (2d Cir. 1968) (union representative and numerous pickets grabbed one employee, knocked another to ground, and beat owner so severely that he required over five months hospitalization; employer violated § 8(a)(1) and § 8(a)(3) by discharging one employee, creating the impression of surveillance, and soliciting an employee to engage in surveillance).

April 22, 1977.[71] We explain below why, despite our acceptance of the Board's evaluation of Conair's conduct as "outrageous" and "pervasive," we reject the Board's nonmajority bargaining order remedy. In all other respects, we uphold the Board's remedial order. We divide our discussion of the Board-imposed remedies into three parts: (1) the bargaining order; (2) extraordinary notice and access remedies generally; (3) the requirement that Conair's president personally read the Board's remedial notice to an assembly of current employees.[72]

A. *The Nonmajority Bargaining Order*

In 1980, for the first time in the long history of the NLRA,[73] a court squarely held that the NLRB has the

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[71] Other "make whole" directives require Conair to: (1) reinstate all discriminatorily discharged strikers with appropriate back pay awards computed from the day of their unconditional offer to return to work; (2) make whole all previously reinstated strikers for any loss of pay resulting from the Company's discriminatory delay in reinstating them after their unconditional offer to return to work; and (3) rehire all strikers reinstated after the strike but subsequently discharged, with appropriate back pay awards. *See* 261 NLRB at 1195 (Board Opinion); *id.* at 1283, 1289 (ALJ Opinion). These requirements are unquestionably within the Board's broad remedial power. *See generally* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187-200 (1941).

[72] As stated earlier, *supra* p. 4, our positions diverge on the Board directives listed above first and third. Judge Ginsburg and Judge Scalia hold that the Board lacks authority to issue a nonmajority bargaining order; Judge Wald would enforce the Board's bargaining order for the reasons stated in her dissenting opinion. Judge Wald and Judge Scalia, for the reasons set out by Judge Wald in Part V.C of this opinion, uphold the Board's presidential reading directive; Judge Ginsburg dissents on this issue.

[73] The Act has been in effect since 1935. *See* National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1976)).

authority to issue a bargaining order despite the absence of tangible evidence that the union ever secured the support of a majority of the affected employees.[74] The full Board itself did not rule unequivocally on the question until 1982, in the case at hand.[75] The issue is vexing[76]

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[74] United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054 (3d Cir. 1980); *cf.* NLRB v. Empire Corp., 518 F.2d 860, 863 n.3 (6th Cir. 1975) (stating in dictum that "[i]t is clear that the Board may, where it finds egregious unfair labor practices, enter a bargaining order even though the union is unable to demonstrate that it represents a majority") (citations omitted); J.P. Stevens & Co. v. NLRB, 441 F.2d 514, 521-22 (5th Cir. 1971) (strongly suggesting same in dictum). A panel of this court, although leaving the question open because the case before it did not require resolution of the "conundrum . . . even preliminarily," noted that it "d[id] not share [the Third Circuit panel's] confidence that the Board's [general remedial] authority is so broad" as to embrace the power to order an employer to bargain with a union that has not concretely demonstrated majority support. Teamsters Local 115 v. NLRB, 640 F.2d 392, 397 n.7, 398 (D.C. Cir.), *cert. denied*, 454 U.S. 827 (1981).

[75] The remand in *United Dairy, supra*, was disposed of by a panel consisting of only three of the five Board members. Two of these adhered to their earlier position that the NLRB possesses authority to issue a nonmajority bargaining order; the third "recognized the Third Circuit's decision as binding upon the Board for the purpose of deciding that case." *Conair Corp.*, 261 NLRB 1189, 1191 n.14 (1982) (discussing *United Dairy II*). Thus, a majority of the Board has never, until this case, issued a nonmajority order on the basis of its own assessment that it has authority to do so.

[76] Commentary, while generally favoring nonmajority bargaining orders in egregious cases, is far from unanimous. *Compare* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 132-39 (1964), Golub, *The Propriety of Issuing* Gissel *Bargaining Orders Where the Union Has Never Attained a Majority*, 29 LAB. L.J. 631 (1978), *and* Note, United Dairy Farmers Cooperative Association: *NLRB Bargaining Orders in the Absence of a Clear Showing of a Pro-*

because it trenches upon employee freedom of choice, a matter at the very center of our national labor relations policy. Nonmajority bargaining orders pose this dilemma: if the Board lacks authority to issue them, employers who offend the law most egregiously will escape the most stringent remedy in the NLRB's arsenal; if the Board has the authority and exercises it to sanction patent and incessant employer unfair labor practices, employees may be saddled for a prolonged period [77] with a union not enjoying majority support.[78] Absent a card

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Union Majority, 80 COLUM. L. REV. 840 (1980) (all advocating Board authority to issue nonmajority bargaining orders), *with* Hunter, Conair: *Minority Bargaining Orders Usher in 1984 at NLRB*, 33 LAB. L.J. 571 (1982), Ostan, *Bargaining Orders*: Gissel *and* United Dairy Farmers *Revisited*, 8 EMPLOYEE REL. L.J. 198 (1982), *and* 49 GEO. WASH. L. REV. 780 (1981) (all questioning Board authority to issue nonmajority bargaining orders).

[77] A union recognized on the basis of a nonmajority bargaining order does not qualify for the one-year protection from decertification and competing union election petitions enjoyed by unions certified in a valid Board election. *See* National Labor Relations Act § 9(c), 29 U.S.C. § 159(c) (1976). However, the Board has consistently held that an employer under order to bargain with a union must do so for *a reasonable time period* (generally one year), without regard to the union's majority status. *See, e.g.*, Keller Plastics E., Inc., 157 NLRB 583, 587 (1966); Poole Foundry and Mach. Co., 95 NLRB 34, 36 (1951). *See also* Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944) ("[A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."). Moreover, once the union and employer have signed a collective bargaining agreement, the Board's contract bar rules presumably will bar a new election in that bargaining union for the duration of the agreement, provided it lasts no longer than three years. *See* General Cable Corp., 139 NLRB 1123 (1962).

[78] Board members who doubt or deny the NLRB's authority to issue nonmajority bargaining orders have pointed out that employees vote against collective representation in more than

majority the Board cannot estimate with any degree of reliability how the employees would have responded in a free election.[79] Inevitably, therefore, a nonmajority bar-

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half of all Board elections. *See Conair*, 261 NLRB at 1197 & n.35 (1982) (Chairman Van de Water, concurring in part and dissenting in part) (quoting United Dairy Farmers Coop. Ass'n, 242 NLRB 1026, 1043 n.65 (1979) (hereafter, *United Dairy I*) (Member Penello, concurring in part and dissenting in part) and citing 1978 and 1980 NLRB annual reports).

On the relationship between union authorization cards and election results, the Fourth Circuit said in NLRB v. S.S. Logan Packing Co., 386 F.2d 562 (4th Cir. 1967):

> In 1962, Board Chairman McCullock presented to the American Bar Association data indicating some relationship between large card-signing majorities and election results. Unions which presented authorization cards from thirty to fifty per cent of the employees won nineteen per cent of the elections; those having authorization cards from fifty to seventy per cent of the employees won only forty-eight per cent of the elections, while those having authorization cards from over seventy per cent of the employees won seventy-four per cent of the elections.

Id. at 565 (footnote omitted). The Board recently reported that this data has not been updated. *See* Letter from John C. Truesdale, Executive Secretary, NLRB, to Carl L. Taylor, attorney for Chamber of Commerce (Sept. 29, 1982), *reprinted in* Brief of the Chamber of Commerce of the United States as Amicus Curiae at A-1 app.

[79] When the union has achieved a card majority, the Board assumes a remedial bargaining order rectifies the employer's illegal conduct by restoring the *status quo ante*. *See Conair*, 261 NLRB at 1196-97 (Chairman Van de Water, concurring in part and dissenting in part). That assumption cannot be indulged when a majority of the employees has never manifested approval of unionization. *See id.* at 1198 (Member Hunter, concurring in part and dissenting in part) (union election campaigns are "subject to ebb and flow in employee sentiment that as often as not has little to do with conduct, lawful or otherwise, engaged in by one of the parties") (footnote omitted); *cf.* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L.

gaining order replaces employee freedom of choice with a government agency's educated guess that the employees will fare better with a union than without one.[80]

Nothing now in the text of the governing statute, or in its legislative history, suggests that Congress contemplated general authority in the Board to select or designate a union for employees, a majority of whom never signaled assent to the arrangement. Nor do lower court judges have secure guidance from the Supreme Court on this issue.

To discourage employer lawlessness, arguably the NLRB should be positioned to choose for the employees when the prospect of an untainted election, held within a reasonable time frame, appears remote. We recognize the appeal of the position that a nonmajority bargaining order may be the only potentially effective means to check

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REV. 1769, 1786 (1983) (citing W. Dickens, Union Representation Elections: Campaign and Vote 108 (Oct. 1980) (unpublished Ph.D. dissertation, Department of Economics, Massachusetts Institute of Technology)) (unions would have won only 46-47% of elections studied if employer had campaigned entirely cleanly); *supra* note 78 (unions lose a majority of elections even when authorization cards have been signed by 50-70% of the affected employees).

[80] The Board's majority observed that a substantial card showing, such as the "approximately 46 percent" shown in this case, shored up an NLRB-imposed bargaining order. 261 NLRB at 1194. However, the Board did not deem critical to its issuance of a bargaining order "any . . . affirmative showing of a reasonable basis for projecting a union's majority support." *Id. But cf.* Bok, *supra* note 76, at 138 (nonmajority bargaining order remedy should be confined to "cases in which there is a reasonable possibility that the union would have ultimately prevailed in the absence of the employer's unlawful acts"). Instead, "[t]he critical predicate to issuance of a nonmajority bargaining order," the Board reasoned, is its finding that the employer's exceptional conduct has "foreclosed the possibility of a fair representation election." 261 NLRB at 1194.

an employer's unlawful conduct designed to nip a union's organizing campaign in the bud.[81] Nonetheless, we believe that the statutory gap we face is too deep for an agency or court to fill. A fundamental policy choice is at stake: Is it ever appropriate to substitute an agency's "big (even if good) brother" judgment for a majority of employees' express choice of a bargaining representative? That basic decision, we believe, should be left to Congress, as the organ of government accountable to the people for establishing the main lines of our national labor relations policy.

1. The *Gissel* dictum

The Supreme Court has not yet confronted a case requiring it to decide whether the NLRB has the power to issue a bargaining order where the union has not shown majority status. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-14 (1969), however, the High Court, citing dictum from *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967), appeared to contemplate the possibility of such an order.

Gissel itself reversed a Fourth Circuit decision which had refused to sanction a bargaining order despite serious employer misconduct and in face of proof that the union had once obtained authorization cards from a majority of employees.[82] The Court observed, nonetheless, that its views and those of the Fourth Circuit were not far apart:

> [T]he actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate

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[81] *But cf.* Weiler, *supra* note 79, at 1795 (bargaining order imposed by the NLRB years after a union's organizing drive is "highly unlikely" to "produce a viable and enduring collective bargaining relationship").

[82] Four cases were consolidated for decision in *Gissel*; all four involved card majorities.

> the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, *without need of inquiry into majority status on the basis of cards or otherwise*, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had."

Gissel, 395 U.S. at 613-14 (quoting *Logan Packing*, 386 F.2d at 570) (emphasis added).

As the Supreme Court recognized, the Fourth Circuit's decisions in both *Gissel* and *Logan Packing* generally disfavored remedial bargaining orders. Indeed, the *Logan Packing* dictum indicated the Fourth Circuit's uncertainty whether a nonmajority bargaining order could be reconciled with the statute even in the most egregious circumstances: "[I]n light of the guaranty of [NLRA] § 7 of employees' rights not to be represented [the use of a nonmajority bargaining order], *if ever appropriate*, must be reserved for extraordinary cases." 386 F.2d at 570-71 (footnote omitted) (emphasis added).

The Supreme Court's *Gissel* dictum, reciting Fourth Circuit dictum, has been read to encompass cases with two characteristics: the employer's conduct falls into the most egregious category; the union's campaign at no point achieved a card majority.[83] Cases with these

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[83] *See, e.g., Teamsters Local 115*, 640 F.2d at 396-97.

The Supreme Court's reference in *Gissel* to the possibility of Board-imposed bargaining orders "without need of inquiry into majority status" perhaps has been read to indicate more than the Court intended. Prior to its reference to the Fourth Circuit's *Logan Packing* dictum, the Supreme Court had set out its reasons for disagreeing with the Fourth Circuit's approach "on all major issues," 395 U.S. at 613, including that

characteristics are commonly described as *Gissel* "category one" cases.

Circuit's distrust of union authorization cards, its view that the 1947 Taft-Hartley amendments had ruled out bargaining orders on the basis of card majorities, and its refusal to accept the Board's *Cumberland Shoe* doctrine. *Id.* at 595-610. The Court then softened its multiple rejections of Fourth Circuit positions by pointing out that the Circuit had "left open the possibility" of issuing bargaining orders without inquiry into majority status in sufficiently egregious cases. *Id.* at 613; *see Logan Packing*, 386 F.2d at 570 (Board "may have the power" to impose a bargaining order as a remedy for egregious unfair labor practices).

Because *Logan Packing*, in dictum, had raised the possibility of Board-imposed bargaining orders in "exceptional cases" marked by "outrageous" and "pervasive" unfair labor practices, the Supreme Court in *Gissel* was able to say that "the actual area of disagreement between our position here and that of the Fourth Circuit is not large." *Gissel*, 395 U.S. at 613. Thus, the High Court's concentration apparently was on the quality of employer conduct *Logan Packing* indicated might justify a bargaining order, not on the notion that such an order could issue "without need of inquiry into majority status."

The probability that the High Court referred only casually to dispensing with inquiry into majority status is heightened by the statement the Court made immediately after it set out the *Logan Packing* dictum:

> The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices.

Gissel, 395 U.S. at 614. The Court cited two cases as illustrative of the Board's policy: United Steelworkers of America v. NLRB, 376 F.2d 770 (D.C. Cir. 1967), and J.C. Penney Co. v. NLRB, 384 F.2d 479, 485-86 (10th Cir. 1967). Both involved employer misconduct designed to destroy the union's *card majority*.

The Supreme Court's holding in *Gissel*, however, is confined to a second category,[84] cases in which the union shows that at one point it had majority employee support:

> The *only* effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, *we should re-emphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior.* In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that *employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order*, then such an order should issue.

395 U.S. at 614-15 (emphasis added) (citation omitted). The Court thus anchored its holding in *Gissel* to the NLRA's core principle that a majority of employees should be free to accept or reject union representation. A bargaining order in a "category two" case, the Court reasoned, not only "deter[s] employer misbehavior," it "effectuat[es] ascertainable employee free choice."

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[84] A third category *Gissel* mentioned includes violations not serious or extensive enough to warrant a bargaining order because remedies concededly within the Board's authority would adequately ensure a fair election. *See* 395 U.S. at 615.

In "category one" cases, by contrast, the employees' free choice is not ascertainable. There is tension between the objective of deterring unfair labor practices and effectuating *expressed* majority sentiment. Dictum reciting dictum, we believe, is not a reliable indicator of the Court's probable view on a tense issue. "[A]ll that can fairly be said [of the *Gissel* dictum] is that the Court left open the issue of whether the Board has the statutory authority to issue a bargaining order in the absence of a showing that the union ever enjoyed majority support." [8] In deciding that issue, the statute itself should be our dominant guide.

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[8] *United Dairy I*, 242 NLRB at 1040 (Member Penello, concurring in part and dissenting in part), *quoted in Conair*, 261 NLRB at 1196 (Chairman Van de Water, concurring in part and dissenting in part).

Judge Wald suggests that in *Sinclair*, one of the four cases the *Gissel* opinion resolved, the Supreme Court in fact approved issuance of a bargaining order without inquiry into the union's majority status. *See* Wald dissent at 10-11. She apparently reads the Supreme Court's words, "even in the absence of a § 8(a)(5) violation," to mean "without need of inquiry into majority status." We do not comprehend why these statements should be regarded as synonymous. At the time the Court decided *Gissel*, Board doctrine had it that an employer could in good faith refuse to bargain in face of a union's proffer of a card majority without committing an 8(a)(5) violation. *See, e.g.*, Aaron Bros. Co., 158 NLRB 1077 (1966). Thus, an 8(a)(5) violation required a card majority *plus* something more—employer bad faith in rejecting a bargaining request. When the *Gissel* Court, in discussing *Sinclair*, said a bargaining order could issue "even in the absence of a § 8(a)(5) violation" it likely meant the employer's bad faith in refusing to bargain, not the union's card majority, could be dispensed with. Supporting this interpretation is the sentence immediately following the ones quoted in Judge Wald's dissent, in which the Court explicitly referred to "the union's majority." 395 U.S. at 615. In short, the point that the union in *Sinclair* had once achieved majority support was not an item merely raised in stating the facts of the case, *id.* at 589, only to be thereafter set aside as irrelevant.

[Continued]

2. The Act's twin pillars: freedom of choice and majority rule in employee selection of representatives

The Board is charged by section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), "with the task of devising remedies to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953).[86] In performing this task, the Board has wide discretion, subject to limited judicial review. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). A prime function of that limited judicial review, however, is to ensure that the Board's decisions are consistent with the Act's basic premises. *See, e.g., H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (Board's remedial authority does not include directing an employer to accede to a particular contract clause); *cf. Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940) (Board exceeded its remedial authority in ordering employer to repay government for wages paid to illegally discharged workers because Board is not empowered to vindicate public rights).

Senator Wagner, architect of the original NLRA, said of majority rule:

> [D]emocracy in industry must be based upon the same principle as democracy in government. Ma-

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[86] [Continued]

While the Supreme Court's discussion of *Sinclair* is less than crisp, we doubt that more is fairly extractable from the High Court's words than this: if the employer engaged in sufficiently egregious coercive practices and the union once had majority support, then even if the employer's grave offenses do not include a § 8(a)(5) violation, a bargaining order may issue forthwith, *i.e.*, without further Board exploration of prospects for an untainted rerun election in the foreseeable future.

[86] Section 10(c) provides, in relevant part, that "the Board shall . . . take such affirmative action . . . as will effectuate the policies of the Act." National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1976).

> jority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered.

79 Cong. Rec. 7571 (1935). For a near half century, the Act has centrally stated:

> Representatives designated or selected for the purposes of collective bargaining *by the majority of the employees* in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . .

National Labor Relations Act, ch. 372, § 9(a), 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. § 159(a) (1976)) (emphasis added). The allied freedom of choice principle also received explicit statement from the start:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through *representatives of their own choosing* . . . .

National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 157 (1976)) (emphasis added).

In 1947, Congress responded to concerns that employees were being pressured into joining unions; it amended section 7 of the Wagner Act to provide, expressly, that employees "shall also have the right to refrain from any or all of such [concerted] activities." Labor Management Relations Act, ch. 120, § 101, 61 Stat. 136, 140 (1947). The House Report made it plain that the legislators sought to preclude the Board from imposing the agency's choice on the employees; instead, the NLRB was to respect and enforce choices—whether for or against a union—made by employees:

> A committee amendment assures that when the law states that employees are to have the rights guaran-

> teed in section 7, the Board will be prevented from compelling employees to exercise such rights against their will . . . . In other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so.

H.R. Rep. No. 245, 80th Cong., 1st Sess. 27 (1947). *See also* 93 Cong. Rec. 3425 (1947) (statement of Congressman Hartley) ("This bill guarantees [workers] . . . [t]he right to join with the[ir] fellow workers to select a collective bargaining agent of their own choosing, that is to say, one that is not forced upon them . . . .").

Congress has authorized one exception to the general rule that a union's selection as exclusive bargaining agent requires the advance approval of a majority of the workers. In recognition of the construction industry's unique needs, Congress amended the NLRA in 1959 to validate "prehire" agreements in that industry. *See* Labor-Management Reporting and Disclosure Act of 1959, Pub. L. 86-257, § 705(a), 73 Stat. 519, 545 (codified at 29 U.S.C. § 158(f) (1976)).[87] Section 8(f) of the Act now provides that a construction industry em-

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[87] As explained in the legislative history:

> One reason for [allowing construction industry employers to enter into prehire agreements with unions not then representing a majority of employees] is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral.

H.R. Rep. No. 741, 86th Cong., 1st Sess. 19 (1959), *quoted in* NLRB v. Local 103, International Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 348 (1978). *See also* Jim McNeff, Inc. v. Todd, 51 U.S.L.W. 4497, 4498-99 (U.S. Apr. 27, 1983) (discussing the general purpose of § 8(f) and Congress' rationale for enacting it).

ployer does not commit an unfair labor practice by signing a collective bargaining agreement with a union before the union has established majority employee support.[88] With the main rule in plain view, however, Congress expressly limited the "prehire" agreement exception: section 8(f) denies unions entering such agreements the one-year protection from election petitions accorded certified unions by section 9(c)(3). *See* National Labor Relations Act § 8(f), 29 U.S.C. 158(f) (1976).

In harmony with the intention of Congress to permit only a narrow exception to the freedom of choice - majority rule premise, Board precedent underscores the voluntary, voidable character of section 8(f) agreements: an employer who refuses to abide by an 8(f) agreement does not thereby violate the duty to bargain imposed by section 8(a)(5), *unless the union can demonstrate its majority status. See, e.g., R.J. Smith Construction Co.*, 191 NLRB 693 (1971). *See also NLRB v. Local 103, International Association of Bridge, Structural & Orna-*

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[88] [I]t shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged . . . in the building and construction industry with a labor organization of which building and construction employees are members . . . because . . . the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such an agreement . . . .

National Labor Relations Act § 8(f), 29 U.S.C. § 158(f) (1976).

Outside the construction industry, an employer who recognizes a union before majority support is demonstrated commits an unfair labor practice even if the employer acted in good faith and the union in fact represented a majority of employees by the time a formal collective bargaining agreement was signed. *See* ILGWU v. NLRB, 366 U.S. 731 (1961) (upholding Board determination that employer violated NLRA §§ 8(a)(1), (2) and that union violated § 8(b)(1)(A)).

mental Iron Workers, 434 U.S. 335, 341 (1978) (prehire agreement is voidable "until and unless [the union] attains majority support in the relevant unit"), *quoted in Jim McNeff, Inc. v. Todd*, 51 U.S.L.W. 4497, 4499 (U.S. Apr. 27, 1983). In the same vein, the Supreme Court has ruled that section 8(f) agreements do not shield unions from the Act's restrictions on picketing aimed at coercing an employer into recognizing a union or at pressuring employees into selecting a particular labor organization as its bargaining representative.[89] *See Local 103, International Association of Bridge, Structural & Ornamental Iron Workers, supra*; *cf. Jim McNeff, Inc. v. Todd*, 51 U.S.L.W. at 4499-4500 (emphasizing that section 8(f) must be construed in light of Act's dominant free choice and majority rule principles).

3. Nonmajority bargaining orders are not within the NLRB's current remedial discretion

Our national labor relations policy is designed to "effectuat[e] ascertainable employee free choice" and "expressed" majority sentiment. *Gissel*, 395 U.S. at 614. A non-majority bargaining order departs from this design. Absent a union election victory or some other concrete

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[89] Section 8(b)(7) of the Act provides, in part:

> It shall be an unfair labor practice for a labor organization or its agents . . . to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees . . . .

National Labor Relations Act § 8(b)(7), 29 U.S.C. § 158(b)(7) (1976).

manifestation of majority assent to union representation, it is impossible to project the employees' choice reliably; imposition of a bargaining order in these circumstances runs a high risk of opposing the majority's will.[90] Judge Wald points out effectively in dissent that the majority's will may also be frustrated when an employer's unlawful acts have eliminated the prospect of a reliable election. She would substitute for the coercion Conair imposed an opposing coercive force imposed by the government. Without a clear direction from Congress, we are not prepared to recognize administrative authority, or arrogate power to ourselves, to remedy one possible injustice by taking the substantial chance of imposing another.

Administrative "expertise," we note, does not appear to command great weight on the question of the Board's statutory authority to issue a nonmajority bargaining order. The NLRB has seen egregious employer conduct on the order of Conair's before. Through decades of administering the Act, however, it issued, on its own initiative, no nonmajority bargaining order in response to an employer's "outrageous" and "pervasive" conduct. It did so, for the very first time, in this case; and it took that action by a bare, one-vote margin.

Today, as in the past, the NLRB is torn over the nonmajority bargaining order issue. The current three-member majority maintains that, in an atmosphere chilled by an employer's egregious anti-union behavior, a nonmajority bargaining order ultimately will enhance employee freedom of choice.[91] Two members maintain, as insistently, that "resolution of the conflict between majority rights and remedial needs by the issuance of nonmajority bargaining orders is "fraught with danger for

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[90] *See supra* notes 78 & 79.

[91] *See Conair*, 261 NLRB at 1193, 1194.

employee freedom of choice."[92] The only Supreme Court expression in point is inconclusive. Congress, the one time it authorized employer recognition of a union without a showing of majority employee support, did so within narrow confines.

If Congress wishes to add to the construction industry exception and permit the Board to impose nonmajority bargaining orders as a sanction for an employer's flagrantly unlawful anti-union campaign, it may do so with whatever qualifications it deems appropriate to prevent the Board from veering too far from the freedom of choice - majority rule premise. Given the current shape of the statute, however, we believe Congress has not placed nonmajority bargaining orders within the NLRB's remedial discretion.[93] Strong arguments can be made for and against granting the Board the authority in question. Administrators and judges, in our view, should not endeavor to anticipate or preempt debate on and decision of this issue in the political arena.[94]

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[92] *Teamsters Local 115*, 640 F.2d at 397 (referring to Member Penello's decision in *United Dairy I*). *See Conair*, 261 NLRB at 1197 (Chairman Van de Water, concurring in part and dissenting in part); *id.* at 1199 (Member Hunter, concurring in part and dissenting in part); *United Dairy I*, 242 NLRB at 1043 (Member Penello, concurring in part and dissenting in part).

[93] *Cf.* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970) (while not overturning Board's ruling that employer violated § 8(a)(5) of the Act by refusing to bargain in good faith over a union-proposed dues checkoff provision, Court rejected as outside Board's remedial authority its order that employer accede to the contract clause in question).

[94] For well-presented argument that the debate over bargaining orders "is really beside the point," and that the current regulatory framework needs basic reshaping, see Weiler, *supra* note 79.

B. *Extraordinary Notice and Access Remedies Generally*

We set out earlier,[95] and restate here, a set of extraordinary notice and access provisions included in the Board's remedial order. Notice of Conair's violations and of the Board's cease and desist order, written in both Spanish and English and personally signed by the Company's president, is to be mailed to each employee at his or her home; copies are to be posted on Company premises; the notice is to be included in appropriate Conair publications; and it is to be published twice weekly for four weeks in local newspapers. For two years, Conair is to afford the Union access to Company bulletin boards, and to employees on Company premises in nonwork areas during nonwork time. A current list of employees' names and addresses is to be furnished to the Union. Also for two years, the Union is to be given notice of, and equal time and facilities to respond to, Company speeches to employees concerning union representation. Further, prior to any Board election held within two years in which the Union participates, the Union is to be permitted to deliver a 30-minute speech to employees on Company time. *See* 261 NLRB at 1195; *id.* at 1285 (ALJ Opinion).

The Board has ordered similar measures in several other cases involving pervasive patterns of illegal employer conduct. This court recently reviewed and upheld an almost identical set of provisions in *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir.), *cert. denied*, 454 U.S. 837 (1981). With respect to the appropriateness of these measures, this case is indistinguishable from *Teamsters Local 115*. We have upheld the Board's determination here that Conair's extreme conduct ruled out a fair, reliable election in the foreseeable future. *Teamsters Local 115* concerned an employer whose "numerous and egregious" unfair labor practices "may have so poisoned

[95] *See supra* note 44.

the well" that a fair election was "no longer viable." *See id.* at 396, 399-401.[96] Judge Mikva, writing for the court in *Teamsters Local 115*, cogently explained why extraordinary notice and access remedies are within the range of the Board's corrective action when employers conduct anti-union campaigns in a patently unlawful manner. We adopt his reasoning and uphold the Board's above-stated notice and access requirements.

WALD, *Circuit Judge*:

C. *The Notice-Reading Order*

The Board, following the recommendation of the ALJ, ordered the president and owner of the company personally to read aloud to the assembled employees the Board's notice of employee rights and employer obligations. *Conair Corp.*, 261 NLRB 1189, 1289 (1982). The Employer argues that this requirement is punitive, oppressive and unwarranted. We are aware that there is support in the language of a recent decision of this court for the view that such a requirement is particularly unpleasant for the chief executive officer of a company, and should be reserved for extraordinary cases where no lesser remedy will achieve the remedial purpose. However, we uphold the Board's exercise of discretion in ordering this unusual remedy here because we find uniquely appropriate circumstances to warrant it.

The requirement that a particular management official read the Board's notice of their rights to employees, although rarely used,[97] has been subject to judicial scrutiny

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[96] The Board, then uncertain as to its authority to issue non-majority bargaining orders, did not issue one in *Teamsters Local 115*.

[97] The Board has imposed such a requirement in at least two cases in addition to those discussed *infra*. *See* United Supermarkets, Inc., 261 NLRB 1291 (1982); The Loray Corp., 184 NLRB 557, 558 (1970).

in this court before. In *Teamsters Local 115* v. *NLRB* (*Haddon House*), 640 F.2d 392 (D.C. Cir. 1981), this court refused to enforce the Board's requirement that the president of a company personally read the notice. The court reached that conclusion only after a painstaking review of the facts of the case, resting its reversal of the Board on "the lack of a particularized need" for such an *ad hominem* remedy. *Id.* at 403. Most important for our purposes, the court found that the record in *Haddon House* revealed little personal involvement by the president in the employer's numerous unfair labor practices. The ALJ in that case had not recommended such a remedy, and the Board itself had articulated no special reason for singling out the president as the indispensable purveyor of the Board's findings and orders. The Board's only rationale—that the president's personal reassurance to the employees would have greater impact—would presumably have justified the same remedy in every unfair labor practice case. The court concluded in these circumstances that the personal dignity interests of the president outweighed the marginal benefits of requiring his personal participation in the public reading. The court in *Haddon House* was careful to note the presence of different circumstances in *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979), *remanded on other grounds*, 633 F.2d 1054 (3d Cir. 1980), where the Board had also ordered the president personally to read the notice.[98] In that case the Board had emphasized the president's extensive personal participation in the violations sought to be remedied.

Thus, *Haddon House* in no way foreclosed the possibility that in another case egregious circumstances might justify the acknowledged personal indignity occasioned by

[98] The Third Circuit enforced the order without discussing the propriety of the public reading requirement. Because the employer had not challenged the remedy before the Board, the court did not permit an initial attack on review. 633 F.2d at 1064.

the Board's extraordinary order of a presidential reading. 640 F.2d at 403. Regrettably, the Board in this follow-up case again failed to address itself specifically to the special circumstances in the record that justified this remedy. But here, as distinguished from *Haddon House*, the ALJ who recommended the remedy, and whose findings and conclusions in this matter were adopted by the Board, made ample findings of fact to support the recommendation that the president personally be required to read the Board's notice to the employees.

The ALJ found that President Rizzuto *personally and repeatedly* communicated to employees the ominous threat to transfer operations to Hong Kong if the plant were unionized. 261 NLRB at 1267-68, 1271. The threat of a plant shutdown, itself held to be an unfair labor practice beyond the protection of the first amendment, *id.* at 1271, became the centerpiece of Conair's intense anti-union campaign. Subordinate officers, in repeating the threat to employees, stressed President Rizzuto's *personal animus* against unions as the basis for the threatened relocation. *Id.* at 1267, 1269. Rizzuto also *personally* threatened employees with the withdrawal of benefits such as Christmas parties and bonuses and the employees' profit-sharing plan if the Union won. Furthermore, Rizzuto *personally* promised his employees, in violation of section 8(a)(1), many improvements in working conditions and wages, including the "open door policy" by which grievances were solicited. *Id.* at 1264-65. Rizzuto, as well as other high company officials, issued this barrage of threats and promises at a series of unprecedented "captive audience" meetings, themselves held to violate section 8(a)(1). *Id.* at 1191 n.15.

Thus it is apparent from the ALJ's findings, adopted by the Board, that throughout the relentless anti-union crusade at Conair Rizzuto committed himself personally to defeating the union drive by unlawful means, under-

mining any possibility of reasoned discussion by systematically promoting fear and promising improvements. Nevertheless, the Employer now asserts Rizzuto's personal dignity as a basis for challenging the requirement that he read aloud to employees the Board notice that Conair will not engage in such practices in the future.[99]

The president of a company may indeed ordinarily be entitled to protest as oppressive a requirement that he read to the employees, even on a single occasion,[100] a statement of their rights and his company's obligations under the Act. The dignity interests implicated by such a requirement must always be carefully weighed and may be decisive when unfair labor practices, however egregious, are carried out entirely or primarily by subordinate management personnel. But it is the pervasive personal involvement of President Rizzuto in the unfair labor practices in this case that creates the need and justification for his personal involvement in their remedy. In order to dispel the atmosphere of intimidation created in large part by the president's own statements and actions, it is justifiable to require at least one formal declaration by him personally that the employees' statu-

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[99] The dissent reaches back to our decision in Int'l Union of Elec., Radio & Machine Workers v. NLRB, 383 F.2d 230, 234 (D.C. Cir. 1967), for language characterizing the requirement of a public reading as "incompatible with the democratic principles of the dignity of man." *See* Ginsburg dissent at 2. Our decision in the IUE case has clearly been superseded, if not actually overruled, by our more recent decision in *Haddon House*, which approved a public reading requirement though not its designation of the president as reader. *Haddon House* recast the issue in less loaded terms, invoking not absolute democratic principles of dignity but the "lack of a particularized need" for the requirement. *See supra* p. 60.

[100] The Board order permits Rizzuto to read the notice to the assembled employees either together or in smaller gatherings, as the Employer chooses. 261 NLRB at 1289.

tory rights will be respected in the future. The Board's order can thus reasonably be said to effectuate the purposes of the Act, and is not punitive, as argued by the Employer. While we emphasize that a remedy such as that ordered here should be reserved for extraordinary circumstances giving rise to a particular remedial need, it is important to recall that the notice to be read by the president is nothing more nor less than an official statement of the statutory rights and obligations found to have been violated by the Employer. Under the special circumstances of this case, we will enforce this aspect of the Board's order.[101]

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[101] We confess to being rather mystified as to the legal basis for the position taken by Judge Ginsburg in her dissent. The opinion does not rely, as *Haddon House* ultimately did, on the particular facts; it appears even to concede that if the remedy that Judge Ginsburg rests her argument heavily on the sug- is ever authorized it is appropriate here. Nor do we believe gestion, contrary to the Board's judgment, that a reading by the president might be less effective; such an intrusion into the expert judgment of the Board would certainly be unwarranted. Finally, the appeal to the principle barring a specific performance remedy for breach of personal service contracts is inapt. That principle operates in a factual and legal context too remote to serve as the basis for overturning the Board in an exercise of remedial discretion. Yet no other legal foundation for this position is evident. The opinion cites no statutory provision barring such a remedy. Although alluding to the supposedly "punitive quality" of the order, Ginsburg dissent at 2, the dissent does not actually appear to argue that the order is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *See* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964); Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943). While the elevated language of the dissent has a vaguely constitutional ring, it identifies no constitutional provision or principle offended by the Board's action. We believe that more than an affront to the sensibilities of individual judges is required to justify wholly eliminating this remedy from the Board's arsenal.

CONCLUSION

For the reasons stated (1) we decline to enforce the portion of the Board's "make whole" directives premised on Conair's alleged discharge of strikers on April 22, 1977; (2) we decline to enforce the Board's bargaining order; (3) in all other respects we deny Conair's petition for review and grant the Board's cross-petition for enforcement of its order.

It is so ordered.

WALD, *Circuit Judge*, dissenting:

I dissent. I believe that the Board had authority under the National Labor Relations Act to order bargaining with the Union based upon its findings, accepted by the majority of this panel, that no other remedy could "dissipate the lingering effects of [Conair's] massive and unrelenting coercive conduct" which "has foreclosed any possibility of holding a fair representation election," and that "a remedial bargaining order is the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization." *Conair Corp.*, 261 NLRB 1189, 1193 (1982). In the face of such findings, my colleagues weakly profess frustration and vexation that "employers who offend the law most egregiously will escape the most stringent remedy in the NLRB's arsenal." Maj. Op. at 43. Yet they are forced to comb through the words of the statute and thousands of pages of its extensive legislative history for the few thin strands they weave into a statutorily-based rejection of the Board's authority to do anything about one of the worst cases of unfair labor practices it has encountered in its fifty year history. I find it paradoxical, yea incomprehensible, that they can accept the Board's findings of massive violations of the Act by the Employer, undermining embryonic labor support, and then infer from the "purpose" of the Act an intent of Congress to deprive the Board of the only remedy it believes can at some point in the near future restore the employees' right to make a free choice to have or not have a union. Either the Board is totally offbase in its findings, or my colleagues have usurped for themselves a mighty responsibility in emasculating the Board's remedial authority in extreme cases to fulfill its congressional mandate to "effectuate the policies of the Act."

I. The Board's Findings

The Board found not only that Conair had violated the Act, but that the violations had been so outrageous and pervasive that, in the Board's words,

> neither our traditional remedies nor even our extraordinary access and notice remedies can effectively dissipate the lingering effects of Respondent's massive and unrelenting coercive conduct. By this conduct, Respondent has foreclosed any possibility of holding a fair representation election. Under these exceptional circumstances, we find that a remedial bargaining order is the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization.

261 NLRB at 1193. It was on the basis of these findings that the Board ordered the Employer to bargain with the Union, in spite of the Union's inability to demonstrate, through authorization cards or otherwise, that it had at any time obtained the support of a majority of the employees eligible to vote. The Board also found, however, that there was a reasonable basis to conclude that the *Union would have enjoyed majority support* but for the Employer's unfair labor practices, relying primarily upon the fact that the Union at one point had the support of forty-six percent of the employees. *Id.* at 1194.

Certainly conclusions as to the predicted effect of the Employer's illegal practices on the election process, the ineffectiveness of alternative remedies, and the probable effect of that illegal conduct on the Union's original ability to obtain majority support involve, even more than ordinary questions of fact, the utilization by the Board of its accumulated experience and expert judgment. The Supreme Court has underscored the necessity for judicial deference when reviewing such determinations. Commenting on the assertion by a circuit court that a cease and

desist order and the posting of notices ordinarily would effectively remedy unfair labor practices, the Court stated, "[i]t is for the Board and not the courts . . . to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). Of course, the Board must always support its conclusions with a reasoned explanation and substantial evidence in the record. It did so here.[1]

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[1] The Employer objects that the Board failed to consider changed circumstances making the issuance of a bargaining order inappropriate after the passage of six years since the unfair labor practices took place. Although it did not offer evidence of any particular changed circumstances, it argues that the Board has a duty to inquire as to whether, for example, there have been changes in the composition of the workforce or other outside forces that would tend to dissipate the lingering taint of the earlier events. Brief for Appellant [hereinafter Employer's Brief] at 43-44. The majority implicitly rejects this objection, thus reaching the issue of statutory authority; I agree that the objection fails, and I summarize my own reasoning for whatever guidance it may offer.

Neither the mere passage of time, NLRB v. Katz, 369 U.S. 736, 748 n.16 (1962), nor normal employee turnover, Franks Bros. Co. v. NLRB, 321 U.S. 702, 703-06 (1944); NLRB v. Ship Shape Maintenance Co., Inc., 474 F.2d 434, 443 (D.C. Cir. 1972), is grounds for overturning a bargaining order. However, the significance of subsequent events for the validity of a Board order is a subject of sharp dispute among the circuits and the Board. *Compare* NLRB v. Drives, Inc., 440 F.2d 354, 366-67 (7th Cir.), *cert. denied sub nom.* General Drivers & Dairy Employees v. NLRB, 404 U.S. 912 (1971); G.P.D., Inc. v. NLRB, 430 F.2d 963, 964-65 (6th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); NLRB v. Staub Cleaners, Inc., 418 F.2d 1086, 1089-90 (2d Cir. 1969), *cert. denied*, 397 U.S. 1038 (1970) (upholding Board's refusal to consider subsequent events) *with* Peoples Gas System, Inc. v. NLRB, 629 F.2d 35 (D.C. Cir. 1980); NLRB v. Western Drug, 600 F.2d 1324 (9th Cir. 1979) (requiring Board to consider certain events). This court has required the Board to consider subsequent events

In evaluating the impact of the unfair labor practices in *Conair*, the Board followed its analysis in *United Dairy*

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only when particularly noteworthy events such as an unusually high rate of turnover, NLRB v. Ship Shape Maintenance Co., Inc., 474 F.2d at 443, or the union's decisive loss in a valid election wholly free of employer coercion, Peoples Gas System, Inc. v. NLRB, 629 F.2d at 47-48, have been brought to the attention of the Board or the court. I am aware of no such event in this case. Furthermore, in neither of these two previous cases had the employer been found guilty of substantial, much less "outrageous and pervasive," unfair labor practices. *See* 474 F.2d at 442 ("[n]o overt anti-union animus . . . was demonstrated to any of its employees."); 629 F.2d at 39 (court emphasized "borderline nature of the violation" of duty to bargain). *See also* NLRB v. Wilhow Corp., 666 F.2d 1294, 1304 (10th Cir. 1981); NLRB v. Western Drug, 600 F.2d at 1326 (turnover need be considered only in close cases, not egregious cases). As the Fifth Circuit stated about practices similar to the Employer's here:

> Practices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed. The Board is not compelled to infer that past practices have attenuated, especially practices striking directly at the heart of the security of the employees, such as threats to close the plant, blacklisting, and the like.

Bandag, Inc. v. NLRB, 583 F.2d 765, 772 (5th Cir. 1978).

Additional considerations militate against imposing a blanket requirement that the Board inquire into possible subsequent events before issuing a bargaining order. First, it would generate enormous administrative difficulties at the Board level and possibly delay resolution of basic issues in the case including Employer liability as well as remedial measures. Second, we would reward the Employer's efforts to postpone the enforcement of an effective remedy by attaching to every normal delay in the process a "bonus" in the form of a requirement of further proceedings entailing additional delay. The Ninth Circuit, confronted with a similar issue, went to the jugular:

> [Delay] is an unfortunate but inevitable result of the process of hearing, decision and review prescribed in the Act. And to deny enforcement, with or without remand for reconsideration on the basis of facts occurring after

Farmers Cooperative Association, 257 NLRB 772, 774 (1981) (*United Dairy II*), which identified the "gravity, extent, timing, and constant repetition" of violations as the key factors bearing upon whether the employer's illegal conduct was so outrageous and pervasive as to foreclose the possibility of a fair election. 261 NLRB at 1192. Summarizing its findings as follows, the Board laid heavy stress on the repetition and insidious timing of the violations committed by this Employer:

> The chilling effect on employee rights of a single discharge or threat of plant closure is difficult enough to erase. Several repetitions of these and other violations of the Act multiply the strength and duration of the impression left on employees. The same multiplier effect results from the manner in which Respondent timed its unlawful conduct—i.e., swift and severe initial retaliation against the Union's organizational efforts, a lengthy campaign of unfair labor practices, an increase in violations as the election neared, and two unlawful discharges even after the election. In moment and duration, the timing of Respondent's unfair labor practices under-

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> the Board's decision, is to put a premium upon continued litigation by the employer; it can hope that the resulting delay will produce a new set of facts, as to which the Board must then readjudicate. Suppose that the Board does so, and again finds against the employer. There can then be a petition to this court, a decision by it, and a petition for certiorari to the Supreme Court. By that time there will almost surely be another new set of facts. When is the process to stop?

NLRB v. L.B. Foster Co., 418 F.2d 1, 4 (9th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

On occasion, especially significant subsequent events may critically undermine the Board's ability to draw educated inferences about future events from circumstances at the time of the violations, even in the case of extremely serious violations. This possibility, however, does not compel us to require the Board in this case to inquire into possible subsequent events.

> scored its enduring resolve to oppose unionization by any means and deeply imprinted on employee memories the drastic consequences of seeking union representation.

Id. at 1193. I agree wholeheartedly with the majority that "we have no cause in this case to second guess the NLRB's expert appraisal of the quality and effects of Conair's unlawful activities."[2] We have today unanimously upheld the Board's judgment that the Employer's coercive conduct has left such an indelible mark on the workforce that not even the Board's extraordinary notice and access remedies would restore to employees their right to make an uncoerced decision about union representation.

The Board also found that it was reasonable to conclude that the Union would have enjoyed majority support but for the Employer's egregious conduct. The Board's finding on this issue, which I consider critical,[3] rests on precisely the same kind of expertise and the same body of precedent, and is thus entitled to the same degree of deference as its other conclusions concerning the seriousness and probable impact of particular unfair labor practices. Yet the majority swiftly passes over the Board's

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[2] Maj. Op. at 36. The majority continues:

> First, this case in several respects is similar to the one other case in which the Board concluded a nonmajority bargaining order was necessary because an employer's 'outrageous' and 'pervasive' unfair labor practices precluded a fair rerun election, and it is distinguishable from cases in which the Board did not reach that conclusion.

Id. at 36-37 (citations omitted).

[3] *See infra* at 26. The Board disclaims reliance on this conclusion as a necessary prerequisite to a bargaining order. Conair Corp., 261 NLRB at 1194. Because this conclusion is a significant aspect of the factual context for the Board's claim of statutory authority, however, I discuss its validity here.

conclusion as to the probable effect of the coercive practices on the Union's initial ability to gain majority support, asserting that "[a]bsent a card majority, the Board cannot forecast with any degree of reliability how the employees would have responded in a free election." Maj. Op. at 43-44. This cavalier rejection of the Board's expert judgment is inconsistent with the posture of deference properly assumed with respect to the Board's closely related conclusions unanimously upheld here. Furthermore, the main study cited in support of the majority's statement actually confirms the Board's premise that serious unfair labor practices by employers have a significant effect on the level of support for the union.[4] Finally, in this case the majority agrees with the Board that the campaign of coercion was exceptionally intense and pervasive. It is in light of that assessment that I briefly review the factual basis for the Board's conclusion. The Union began its organizing campaign in March and by April 11 had the support of about forty-six percent of the employees. 261 NLRB at 1205. Yet only days after the onset of the Employer's campaign on April 4, a group of twenty-five to thirty employees approached the Union, stating that the Employer's threats had made them fear losing their jobs;

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[4] The majority cites Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1796, 1786 (1983) (discussing W. Dickens, Union Representation Elections: Campaign and Vote (Oct. 1980) (unpublished Ph.D. dissertation, Department of Economics, Massachusetts Institute of Technology)) for the conclusion that unions would have won just under half of all elections if employers had campaigned entirely cleanly. *See* Maj. Op. at n.79. The same study concluded, however, that the number of pro-union votes was reduced by 15% where employer unfair labor practices included threats or actions against union supporters. Weiler, *supra*, at 1781-86. In particular, the study results indicate that employer intimidation is most effective when the union does not enjoy overwhelming support. *Id.* at 1785.

several requested the return of their cards. *Id.* at 1191. The Union secured only fourteen authorization cards after April 11, the day the strike began. *Id.* at 1205 n.15. If the Employer's conduct had such an immediate impact on employees who had already expressed their support for the Union, it was certainly reasonable for the Board to conclude that it may have had an equally inhibiting impact on the relatively small number of undecided employees—about fifteen—that would have sent the union over the fifty percent mark and into majority status for recognition purposes. There is little question but that the Union would have continued to gain adherents but for the Employer's relentless anti-union campaign. The Board's conclusion in this respect is thus supported by adequate reasoning, established Board precedent concerning the impact of various unfair labor practices, and substantial evidence in the record.

II. The Board's Authority to Issue a Non-Majority Bargaining Order

The Board rested its claim of statutory authority in large part on the Supreme Court's opinion in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), and on subsequent judicial interpretations of that decision. I, too, find support for the Board's authority in the language and reasoning of these cases, recognizing that, as always with Supreme Court dictum and even with Supreme Court holdings, what the Court giveth it can as easily taketh away. In any event, because the issue of non-majority bargaining orders has been smoldering on the Board and in this court for decades, I believe a searching inquiry into the language, legislative history, and underlying policies of the Act, as well as the practical effects on labor relations of upholding or overturning the Board, is called for before pronouncing judgment on either side of the issue. I find in none of these sources,

singly or cumulatively, any contrary indicators to what the Supreme Court appeared to be saying in *Gissel*. On the contrary, I conclude from my inquiry that the issuance of a non-majority bargaining order under exceptional circumstances like these may well be the only way to "effectuate the policies of the Act."

A. *The* Gissel *Decision and Category I Cases*

In *Gissel*, the Court decided that a majority of union authorization cards, unambiguous on their face, constituted "convincing evidence of majority support." If an employer refused to bargain with a union that had obtained a majority of valid cards, and at the same time committed independent unfair labor practices tending to undermine the union's majority strength and impede the election process, the Board could issue a bargaining order as a remedy even if the union subsequently lost the election.

The Court went on to summarize in some detail the factors that determine the appropriateness of a bargaining order in three categories of cases:

> Despite our reversal of the Fourth Circuit below in Nos. 573 and 691 on all major issues, the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, *without need of inquiry into majority status on the basis of cards or otherwise*, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." The Board itself, we should add, has

> long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices.
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> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a *lesser showing of employer misconduct* is appropriate, we should reemphasize, *where there is also a showing that at one point the union had a majority*; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior.

395 U.S. at 613-14 (citations omitted) (emphasis added). The Court thus reinforced its approval of the "Category I" non-majority bargaining order described by the Fourth Circuit by indicating that a showing of majority support is necessary only in "less extraordinary cases" falling into Category II. The Court also described a third category of even less serious offenses in which no bargaining order was appropriate without an election. *Id.* at 615.

The Court's description of Category I cases of outrageous and pervasive violations where a bargaining order is warranted "without need of inquiry into majority status" is characterized by the majority as mere dictum, a palliative to the rejected and presumably dejected Fourth Circuit.[5] I am not as certain as the majority that the "dictum" can be so easily dismissed. In one of the four cases decided by the Court in *Gissel*, the Court

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[5] *See* Maj. Op. at 46-47; *see also* Teamsters Local 115 v. NLRB, 640 F.2d 392, 396 (D.C. Cir. 1981) (*Haddon House*); Employer's Brief at 36. *Cf.* United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054, 1065-66 (3d Cir. 1980).

appears to have applied the analysis it described as appropriate for Category I cases:

> In *Sinclair*, No. 585, the Board made a finding, left undisturbed by the First Circuit, that the employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats. The Board therefore did not have to make the determination called for in the intermediate situation above that the risks that a fair rerun election might not be possible were too great to disregard the desires of the employees already expressed through the cards.

Id. (footnote omitted). As the majority suggests, the court's statement is cryptic, and is conceivably open to an interpretation that its reference to the "absence of a § 8(a)(5) violation" alludes only to the employer's possible lack of bad faith in refusing to bargain. *See* Maj. Op. at n.85. But the language is also open to a reading that the Court did not feel it necessary to inquire into the majority status of the union in disposing of the *Sinclair* case. Because the extreme nature of the employer's coercive conduct made a fair election impossible and therefore placed *Sinclair* into Category I, the Board did not have to meet the Category II requirements of showing that the union had obtained a card majority and that a fair election was too unlikely to disregard this showing of majority support. This court has previously adopted the latter interpretation, declaring that the Supreme Court in *Gissel* "approved the bargaining order entered against Sinclair without a showing of a prior union majority because the facts indicated 'exceptional' or 'outrageous' unfair labor practices." *Amalgamated Clothing Workers* v. *NLRB*, 527 F.2d 803, 808 (D.C. Cir. 1975), *cert. denied sub nom. Jimmy Richard Co.* v. *NLRB*, 426 U.S. 907 (1976).

Virtually every other court I know of has interpreted the *Gissel* decision similarly, assuming the existence of

an extreme category of cases in which a bargaining order may issue in the absence of a card majority.[6] Only recently, however, did the case materialize.[7] In *United Dairy Farmers Cooperative Association* v. *NLRB*, 633 F.2d 1054 (3d Cir. 1980), the Third Circuit faced the issue for the first time in a union appeal from the refusal by a divided Board to issue a bargaining order in a *Gissel* Category I situation.[8] After a careful analysis of

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[6] *See, e.g.*, NLRB v. Montgomery Ward Co., 554 F.2d 996, 1002 (10th Cir. 1977); NLRB v. Armcor Indus., Inc., 535 F.2d 239, 244 (3d Cir. 1976); J.P. Stevens Co., Gulistan Div. v. NLRB, 441 F.2d 514, 519 (5th Cir.), *cert. den.*, 404 U.S. 830 (1971); NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 570 (4th Cir. 1967). *But cf.* NLRB v. Roney Plaza Apartments, 597 F.2d 1046, 1051 n.8 (5th Cir. 1979).

[7] Prior to 1979, the Board had uniformly declined to issue bargaining orders, even in cases of "outrageous" and "pervasive" violations, in the absence of a showing of majority status. *E.g.*, Fuqua Homes Missouri, Inc., 201 NLRB 130 (1973); GTE Automatic Elec., Inc., 196 NLRB 902 (1972); The Loray Corp., 184 NLRB 557 (1970). It is not clear from these cases, however, that the Board believed itself to be without authority ever to order this remedy. In none of the three cases above had the precise extent of employee support for the union been litigated at all; nor had the General Counsel sought a bargaining order. Furthermore, the Board found, explicitly in The Loray Corp., 184 NLRB at 558, and implicitly in the other two cases, that other non-bargaining remedies would be adequate to redress the employers' violations. As I read these cases, the Board's determination that a bargaining order was not appropriate was not so much based on its view of the limits of its statutory authority as on its expert assessment of the particular remedial requirements presented by a given set of facts.

[8] 633 F.2d at 1064-65. Two members of the Board believed that, although the Board may have such authority under some circumstances, this was not the appropriate case for the exercise of that authority. United Dairy Farmers Coop. Ass'n, 242 NLRB 1026, 1028 n.11 (3d Cir. 1979) (*United Dairy I*). Two members argued that the Board did have the authority and should exercise it in this case. *Id.* at 1031-38.

the *Gissel* decision and its rationale, the court held that "the Board has the remedial authority to issue a bargaining order in the absence of a card majority and election victory if the employer has committed such 'outrageous' and 'pervasive' unfair labor practices that there is no reasonable possibility that a free and uncoerced election could be held." *Id.* at 1069.

Nonetheless, despite the *Gissel* pronouncement and a contemporary consensus of circuit court interpretations of it to the effect that the Board may issue a non-majority bargaining order to counter extraordinarily flagrant employer violations, our court decides today that the Board has no statutory authority ever to issue such an order. *See also Teamsters Local 115* v. *NLRB* (*Haddon House*), 640 F.2d 392 (D.C. Cir. 1981) (earlier misgivings about such authority).[9] With the understandable queasiness experience brings from relying too heavily on predictions of what the Supreme Court will do in the future based on what it has said in the past, I turn now to an examination of the language and legislative history of the Act to see whether the Board's interpretation of *Gissel* will hold.

B. *The Language of the Act*

The Board points to the broad remedial mandate of section 10(c), empowering it to order a party "to take such affirmative action . . . as will effectuate the policies

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[9] In *Haddon House*, this court upheld the Board's refusal to issue a non-majority bargaining order without discussing the Board's statutory authority to do so. Faced with the same Board member lineup as the Third Circuit in *United Dairy*, *see supra* note 8, this court was not persuaded that the Board's decision rested on the legal conclusion of one member that the Board lacked authority. We found that the Board decision just as likely turned on the judgment of two members that the exercise of that authority was inappropriate in that case, and we therefore did not reach the question of statutory authority. 640 F.2d at 397 n.7.

of [the Act]" once it has found a violation. The Employer asserts and the majority now decides that the Board's seemingly wide authority under section 10(c) is in fact securely bound by a fundamental principle of majority rule incorporated in section 9(a) which acts as an absolute limitation on the Board's authority to issue a non-majority bargaining order, whatever the circumstances.

Section 9(a) states in relevant part: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . ." 29 U.S.C. § 159(a). The Employer and the panel majority read the exclusive majority representation rule of section 9(a) into section 7, which provides that "[e]mployees shall have the right to self-organization, . . . to bargain collectively through representatives of their own choosing, . . . and shall also have the right to refrain from any or all such activities." 29 U.S.C. § 157. They say that together the two sections mean that the employees' right to bargain through representatives chosen by majority rule is violated by any Board order that requires an employer to bargain with a union that cannot demonstrate that it has at any time enjoyed the support of a majority of the employees, regardless of the egregiousness of the employer's conduct. In addition, the Employer points to section 8(a)(2), which makes it an unfair labor practice for an employer "to dominate or interfere with the formation . . . of any labor organization," 29 U.S.C. § 158(a)(2), and which has been interpreted to prohibit an employer from voluntarily recognizing a union that repsents only a minority of its employees. *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961).

Sections 9(a) and 8(a)(2) define conduct constituting unfair labor practices on the part of employers. They appear to have no direct application to the scope of the

Board's remedial authority when employers have been found guilty of unfair labor practices. Congress most assuredly knew how to limit the Board's authority. For example, section 9(b), following directly after section 9(a) and dealing with determination of bargaining units, clearly limits the Board's power. It provides "that the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." 29 U.S.C. § 159(b). It seems obvious to me that neither section 9(a) nor any other section of the Act dealing with unfair labor practices by an *employer* can be automatically read as an explicit limitation on the authority of the *Board* to take remedial action as to those same unfair labor practices.[10]

The majority's argument that section 9(a)'s majority principle, in conjunction with section 7's guarantee of

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[10] The Supreme Court has on occasion limited exercise of the Board's remedial authority because of conflict with a basic policy embedded in the Act. In H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970), the Court held that the Board lacked authority to order an employer to accept a particular union bargaining proposal, citing section 8(d) of the Act: "[The obligation to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession . . . ." 29 U.S.C. § 158(d). The Court reached its conclusion that the Board lacked authority in that case not from section 8(d)'s language alone, however, but rather from overwhelming evidence in the legislative history that Congress explicitly intended to preclude the Board from intruding into the substantive terms of collective bargaining agreements. *See* 397 U.S. at 104-06. In my view, the "plain language" of sections 7 and 9(a) offers far less support for the Employer's (and the panel's) view that the Board is barred from ever issuing a non-majority bargaining order, even when the employer has made a fair election impossible, than did the explicitly preclusive language of section 8(d), cited in *Porter*, defining exactly what the obligation to bargain did or did not mean.

freedom of choice, limits the Board's remedial authority in all cases and for all time ignores the quintessential paradox of this case. The Employer has been found to have engaged in an intense campaign of egregious unfair labor practices in complete and deliberate disregard of the section 7 right of employees freely to choose their bargaining representatives. Now the Employer—and the panel majority—emerge as the champions of that very right of choice: they would invoke that right as an absolute bar against the Board's authority to remedy the Employer's violation by issuing a bargaining order. But in fact, by my colleagues' own admission they simply leave the employees in an eternal limbo, for the Board has determined that a bargaining order in the short run is the only means of restoring to the employees their statutory right freely to choose whether or not to be represented in the long run by a union. Thus both the Board and the panel/Employer assert the same statutory sections as the basis for their diametrically opposite positions on the permissibility of a non-majority bargaining order. I am particularly reluctant to reject the Board's construction of its remedial authority on the basis of a purported conflict with the very statutory language it is claiming to implement. The bottom line here is how the employees, having been subjected to relentless employer pressures not to choose a union, can be best restored to some kind of equilibrium in which they can choose freely for or against the Union. The Board, as the expert in the field, says this can happen only if a short-term bargaining order is put into effect; the panel says that such an order is against statutory policy and that the employees therefore should be left in the *status quo*. Certainly the language of the statute alone does not compel Board paralysis of this sort.

C. *Legislative History*

There is nothing in the legislative history of the Wagner Act or subsequent amendments to indicate that Con-

gress meant to withhold this remedial power from the Board. The majority's citations prove only that Congress provided a mechanism for employees in the usual situation to pick or reject their union by majority rule and required employers to abide by that decision. There is not a single word, however, to suggest that, if a fair election could not be held because of employer interference, the Board's remedial powers were absolutely restricted by majority rule.

Of course, Congress in passing the Wagner Act embraced the principle of majority rule in the selection of bargaining representatives by employees. S. Rep. No. 573, 74th Cong., 1st Sess. 13-14 (1935); H.R. Rep. No. 972, 74th Cong., 1st Sess. 18-19 (1935). It did so to obviate refusals by employers to recognize a labor organization that represented the majority of employees, and their attempts instead to divide employees by bargaining with individuals or with a company union that represented only a minority. Congress thus associated minority bargaining by the employer with collusive and complacent company unions; it was also worried about destructive competition among unions caused by employer bargaining separately with factions or individuals. *See* H.R. Rep. No. 972 at 19. These dangers arise where an organized majority is denied recognition; they have nothing to do with a situation like this where the Board orders the employer to bargain with the only employee organization that reasonably could be expected to have gained majority support but for the outrageous and pervasive unfair labor practices of the employer.

Throughout the Act's passage, the principle of majority rule was always discussed in the context of an employer's bargaining obligations or the employees' representation choices; it was never discussed as a limitation on the Board's powers. Indeed, the Act's major sponsor, Senator Wagner, explicitly approved the possibility of a remedial bargaining order in the absence of a current majority when he approved the result in *Texas & New*

Orleans Railroad Co. v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930). *See Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 21-22 (1935) (statement of Sen. Wagner). In that case, decided under the Railway Labor Act, the Supreme Court upheld the order of the district court "disestablishing" a company union which could show current majority support, and reinstating the union that had enjoyed majority support before the company's illegal and coercive campaign against it. The company was ordered to recognize the union that currently had only minority support until the employees rejected it in a fair and uncoerced election. 281 U.S. at 557, 571. In addressing that case, Senator Wagner implicitly acknowledged that strict application of the principle of majority rule must sometimes give way to the need to remedy illegal employer practices in order to permit employees genuine freedom of choice.

In general, however, non-majority bargaining orders as remedial measures were not discussed. *See* H.R. Rep. No. 972 at 21 (examples of remedial measures within Board's power). I infer from this silence at most either that Congress never conceived of the extraordinary circumstances giving rise to the need for a non-majority bargaining order or that Congress did not wish to constrain the Board's choice of remedial measures in this manner. I certainly see no way to infer, as the majority does, that the Act meant to take away from the Board this specific remedy without ever identifying it. The legislative history of the Wagner Act accordingly gives no cause to overrule the Board in its choice of remedies.

Nor does the history of subsequent amendments to the Wagner Act. The Taft-Hartley amendments in 1947 were addressed in part to perceived excesses by the Board. For instance, they limited the Board's power to certify bargaining representatives by means other than secret ballot election, 29 U.S.C. § 159(c);[11] they pro-

[11] Section 9(c) of the Wagner Act had permitted the Board to certify a representative by "a secret ballot of employees,

vided for a process by which employees could decertify a bargaining representative they no longer supported, 29 U.S.C. § 159(c)(1)(A)(ii); § 159(e)(1); they prohibited certain kinds of "closed shop" agreements which limited employment to union members, 29 U.S.C. § 158(a)(3). The Supreme Court in *Gissel*, however, demonstrated the irrelevance of any of these changes to the Board's independent power to issue a remedial bargaining order, noting the critical distinction that "[a] certified union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 598-99 (1969).[12] Congress did not deal either in 1947 or in later amendments with the kind of remedial order issued by the Board here, which neither certifies a union nor compels union membership.

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or . . . any other suitable method to ascertain such representatives." National Labor Relations Act, ch. 372, § 9(c), 49 Stat. 453 (1935). The Taft-Hartley amendments in 1947 substituted a more elaborate set of guidelines effectively limiting certification to unions that had gained a majority in a valid secret ballot election. Labor Management Relations Act, ch. 120, Title I, § 101, 61 Stat. 143 (1947) (codified at 29 U.S.C. § 159(c)).

[12] For example, for a one-year period following certification, there is an irrebuttable presumption of majority status during which the employer must bargain with the union, Brooks v. NLRB, 348 U.S. 96, 103 (1954), and during which no rival union may petition for an election, 29 U.S.C. §§ 159(c)(3); 159(e)(2), or picket for recognition, 29 U.S.C. § 8(b)(4)(c). After the one-year "certification bar" the union has the benefit of a continuing but rebuttable presumption of majority status. Brooks v. NLRB, 348 U.S. at 103-04. In addition, the so-called "contract bar" calls for the automatic dismissal of any representation petition by a rival union during the term, up to three years, of a valid collective bargaining agreement between an employer and the certified representative of the employees. *See, e.g.*, Leonard Wholesale Meats, Inc., 136 NLRB 1000 (1962). A union that has obtained bargaining rights under a remedial bargaining order does not necessarily acquire these benefits.

The majority argues that Congress' addition in 1959 of section 8(f), authorizing pre-hire agreements with unions in the construction industry even in the absence of a prior showing of majority support, reinforces the conclusion that there is no other authorized exception to the principle of majority rule. I disagree. If Congress had not passed section 8(f), employers in the construction industry, like other employers, would be barred by section 8(a)(2) from voluntarily concluding agreements with a union that cannot demonstrate majority support. Congress recognized the special needs of the construction industry and permitted such voluntary agreements. Thus, section 8(f) is an exception to a general rule that the Board's remedial order here does not contravene. In other words, the majority's view of the significance of section 8(f) is merely a recapitulation of the Employer's argument that the Act's prohibition on voluntary minority bargaining precludes a remedial non-majority bargaining order. I do not believe that this prohibition has any bearing upon the power of the Board to order bargaining where the employer has by extremely coercive conduct prevented the union from gaining a majority. *See infra* at 21.

In sum, neither language nor legislative history contains anything to show that Congress intended to prohibit the Board from issuing a non-majority bargaining order if it is truly necessary to "effectuate the purposes of the Act." The centrality of the majority rule principle in the Act only reinforces the paradox that results from the majority's ruling today: the Board is precluded by the principle of majority rule from issuing a non-majority bargaining order when the Board has found (and the panel majority has conceded) that such an order is the only effective way of restoring to employees their right to make an uncoerced majority decision about union representation. I find such statutory creativity disturbing, to say the least.

D. *The Policy of the Act: Majority Rule and Employee Freedom of Choice*

The majority's argument—like the Employer's—appears to boil down to one of statutory ambience: Even if there is no explicit prohibition of a non-majority bargaining order in the language or legislative history of the Act, the entire statutory scheme of collective bargaining rests on the premise of majority rule and its corollary, the prohibition against minority bargaining set out in *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731, 738 (1961). Assuming that this is true, however, there is a familiar principle that the need to remedy a violation often justifies and even requires measures that might be unauthorized if undertaken on the actor's own volition. For example, state-imposed racial quotas, in the absence of an arguable constitutional violation, may run afoul of the fourteenth amendment under *Bakke*.[13] But courts clearly have the power to order race-conscious remedies for proven constitutional violations.[14] This principle also operates throughout the administration of the Act in contexts no longer in dispute. Thus, an employer would presumably violate the Act's prohibition on minority bargaining if he voluntarily recognized and bargained with a union that, although it once had a card majority, had since lost a Board election. Yet *Gissel* clearly authorizes the Board to order bargaining under such circumstances if the employer has committed substantial independent unfair labor practices. The prohibition on minority bargaining thus has no application to the permissibility of a bargaining order.

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[13] University of California Regents v. Bakke, 438 U.S. 265 (1978).

[14] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). *Cf.* Fullilove v. Klutznick, 448 U.S. 488 (1980) (10% minority set-aside is within Congress' power to enforce 14th amendment, in view of past discrimination).

The principle of majority rule, while indeed central to the scheme of employer-employee rights and obligations, has never been mechanically applied to bind the Board in the remedial area. The *Gissel* situation is only one of several recognized by the Supreme Court in which the Board, pursuant to and consistent with the policies of the Act, may require an employer to bargain with a union that cannot demonstrate current majority status,[15] or to cease bargaining with a union that does appear to have the support of a majority.[16] Furthermore, the Board is clearly authorized to invalidate for cause the results of elections in which a majority of employees expressed their preference either for[17] or against[18] a union.

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[15] The Board may order an employer to bargain with a union that had a card majority before the employer succeeded in obtaining evidence of majority support for an employer-dominated union, International Ass'n of Machinists v. NLRB, 311 U.S. 72 (1940); and with a union that had a card majority but withdrew its election petition because of the employer's unfair labor practices. Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944). Furthermore, an employer may not refuse to bargain with a union within one year of its certification or during the term, up to three years, of a valid collective bargaining agreement whether or not the union can still demonstrate current majority support. Brooks v. NLRB, 348 U.S. 96 (1954).

[16] The Board may order an employer to cease recognizing an unlawfully dominated union even though it may have majority support. NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1937).

[17] *See, e.g.*, NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973) (Board should set aside election where union waived initiation fees for employees who signed cards before election). Courts have shown no reluctance to direct that a union victory be set aside in cases of union misrepresentations. *See generally* General Knit of California, Inc., 239 NLRB 619, 626 (1978) (Member Penello, dissenting) (citing 47 cases in which courts denied enforcement of Board orders based on elections with minor union misrepresentations).

[18] *See, e.g.*, NLRB v. Exchange Parts Co., 375 U.S. 405 (1964) (upholding Board invalidation of union electoral loss

In truth, the majority rule principle is inextricably tied in the statutory scenario to the unfair labor practice prohibitions against employer coercion, domination and discrimination contained in sections 8(a)(1), (2) and (3) of the Act. These limitations on employer conduct during organizational campaigns are more severe than we would tolerate in the political process, but they are acceptable in the labor context precisely because of the inherent potential for economic coercion of employees by the employer. As the Supreme Court stated in *Gissel*,

> what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk.

395 U.S. at 617-18. The entire statutory scheme is based on the clear congressional endorsement of the notion that only in the absence of illegal employer coercion can a majority of employees make the kind of free choice for or against union representation that is at the heart of the majority rule principle incorporated in the Act.

Thus it is heavy irony that this majority rule principle should now be touted to prevent the Board from dealing with the most intimidating tactics adopted by employers to discourage union representation. We have here a case in which the Employer has been found guilty by the Board and this court of such outrageous and pervasive violations of the Act as to destroy any electoral atmosphere in which employees may express free choice. Under these circumstances, the vigorous assertion by the Employer and the majority of the statutory rights of the employees to select or not to select a bargaining repre-

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where employer granted unlawful economic benefits during campaign).

sentative strikes me as either disingenuous or incredibly naive.

I would emphasize here what a remedial bargaining order does and does not do and the Board's reasoning as to how such an order can help restore to employees their right to make an uncoerced decision about union representation and collective bargaining. First, a bargaining order is not tantamount to certification, which, as we have noted, affords the union certain statutory privileges and a continuing presumption of majority status.[19] As the Supreme Court has recognized, "[t]here is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition." *NLRB* v. *Gissel Packing Co.*, 395 U.S. at 613. The bargaining order does not impose union membership.[20] Furthermore, the union's ability to impose contractual terms against the will of a majority of the employees is virtually nonexistent:

> The employees need not strike against their will. And they will generally possess some influence over the terms of the bargain, if only because the contract will often depend, in the last analysis, on their willingness to fight to obtain it. Still more important, there is every reason for the union to negotiate a

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[19] *See supra* note 12.

[20] As one commentator has noted,

> "bargaining will not necessarily compel the employees to join the union or pay dues. These consequences will follow only if a union security clause is negotiated. An employer who will violate the law to resist unionization is an unlikely prospect for a union security clause, and it will be difficult to pressure him into making this concession when the majority of the employees are opposed.

Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 135 (1964).

> contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed.[21]

At the same time, a bargaining order does impose a trial period during which the employees can gain exposure to the merits of union representation in the only way that remains possible when the employer has irremediably destroyed all opportunity for a free election preceded by open discussion and debate. When the employer has so flagrantly flouted the law and the rights of its employees in order to keep out the union, thereby impressing upon employees his complete and unchallengable control over their working conditions, a bargaining order may provide the only opportunity, albeit a temporary one, for them to see at work an employee organization with which their employer is obligated to negotiate about specific proposals to better their working conditions. This interim arrangement may also serve to dissuade them of lingering fear that it is impossible to elect a union without suffering dire consequences. In grossly tainted atmospheres, only the dynamics of ongoing collective bargaining and the display of power by a functioning employee organization can dispel the overwhelming sense of impotence created by the employer's prior success in breaking up the employees' attempts at self-organization.[22]

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[21] *Id.*

[22] This case thus presents a far different situation than we faced in Local 57, Int'l Ladies' Garment Workers' Union v. NLRB, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967), in which the employer had violated sections 8(a)(1), (3), and (5) when it moved its operations to Florida from a unionized shop in New York. As part of its remedy, the Board ordered the employer to bargain with the union at the Florida location. We denied enforcement because the remedy violated the Florida employees' freedom to select a

I do not view this case, as the majority does, as presenting a conflict between employee freedom of choice and majority rule on the one hand, and the Board's determination to punish the Employer or simply deter future violations on the other. As the Board explained in its decision, the Employer has already effectively undermined any opportunity to ascertain whether an uncoerced majority would choose to be represented by this union, *Conair Corp.*, 261 NLRB at 1194, although "a reasonable basis exists for concluding that the Union would have enjoyed majority support but for Respondent's unfair labor practices." *Id.* As noted previously, the union held authorization cards from forty-six percent of the employees before the Employer's vicious campaign began to take its toll. *Id.* I would be less confident about the propriety of a bargaining order in a case in which it was not reasonably likely that the union would have gained majority support in a free atmosphere. In this case, however, the failure of the union by less than five percent to make it over the fifty percent mark at any point in its campaign demonstrates to me the imprudence of drawing this "clear bright line" where an agency's statutory authority to choose remedial measures for extreme violations is at issue.

To invoke the principle of majority rule as an absolute bar to a bargaining order in cases of extreme coercion

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bargaining representative. *Id.* at 300. The Board had justified its remedy solely on the basis of the need "to deprive the company of the 'fruits' of its illegal acts," *id.*, and to deter others, *id.* at 303. In that case, unlike this one, there had been no showing of any interest by the Florida employees in the union and no claim that they had been coerced so as to make a fair election impossible. Furthermore, the Board did not even assert that the remedy would restore to the New York employees the section 7 rights violated by the employer. In short, the Board had wholly ignored the rights of one group of employees, not even to restore the rights of another group of employees, but simply to punish the employer and deter others. This case is obviously radically different.

like this introduces into the Act an unjustified premise that the employees' right to reject collective bargaining is more important than their right to choose it,[23] a premise Congress clearly did not endorse. To leave untouched, perhaps permanently, the negative fallout of an employer's successful campaign to wipe out organizational activity means that the employees are indefinitely presumed to have rejected the union even when they have been prevented from exercising their free choice. To permit a Board order as temporary surrogate for their right to select a union representative, on the other hand, appears a far less drastic alternative, and more in keeping with the congressional policy of encouraging free choice and collective bargaining.[24] I believe that the fundamental statutory policy of protecting employees' freedom to choose by majority rule whether to be represented by a union is not undermined but rather is advanced by a temporary non-majority bargaining order where it is reasonable to conclude that the union would have gained majority support but for the employer's outrageous and pervasive unfair labor practices, and where

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[23] The Chamber of Commerce in its amicus brief openly urges this premise upon us. It argues that "(A) unionization imposes major burdens on personal liberty that most Americans refuse to accept, and (B) the Act contemplates that those burdens will be imposed only in response to the active, demonstrated, majority will of the employee unit." Brief of amicus curiae Chamber of Commerce at 8.

[24] The majority complains that I "would substitute for the coercion Conair imposed an opposing coercive force imposed by the government." Maj. Op. at 56. I view the choice differently. Faced with massive and documented coercion by Conair that the majority agrees made a free election impossible, the Board applied the only remedy it found effective, even though there was a theoretical possibility (almost purely hypothetical in this case) that undesired union representation might be temporarily imposed on employees. So viewed, the Board's and my choice seems not only justifiable but necessary under the Act.

no other remedial measures available will remove the taint of those practices so as to permit a fair election in the foreseeable future. I simply do not understand the logic of the majority's walk-away construction when confronted with violations of these dimensions and impact.

E. *The Policy of the Act: Deterrence*

In the face of coercive conduct as grave, deliberate, and unrelenting as the Employer's conduct here, the Supreme Court has also said that the Board may properly give increased weight to the deterrent effect of a proposed remedy. The *Gissel* Court stressed the importance of deterring the extreme misconduct covered by Category I; only on a "lesser showing of employer misconduct" covered by Category II did the Court deem the goal of "effectuating ascertainable employee free choice . . . as important a goal as deterring employer misbehavior," and consequently require "a showing that at one point the union had a majority." 395 U.S. at 614.

The deterrent value of a bargaining order against an employer who has engaged in egregious illegal behavior is apparent. The prospect of a remedial bargaining order should create a strong incentive for the anti-union employer to keep its campaign within legal limits. For even if the company wins the organizational battle, it may lose the collective bargaining war. On the other hand, today's decision that no bargaining order can ever issue unless the union has gained the support of more than half the unit employees at some point in the process creates reverse and indeed perverse incentives. The anti-union employer can avoid ever dealing with a union by rushing in at the first sign of union sentiment, before employees have begun to experience the collective strength of numbers, with threats of plant closings, mass discharges and close surveillance, thereby creating an atmosphere of coercion that outlasts the tenure of current employees and outdistances the remedial powers of the Board. In-

deed, we need not conjure up such a hypothetical horror story, for the Employer here has done precisely that. The Act is dealt a debilitating blow by the majority's ruling and the Board is deprived of its only effective means to remedy and deter a massive campaign of coercive and illegal conduct by an employer bent on crushing inchoate union organization.

Thus I would uphold the Board's authority to issue a bargaining order even in the absence of a positive showing of majority support for the union in the circumstances in this case, in which (1) the employer has engaged in unfair labor practices so pervasive and outrageous that there is no reasonable possibility of a fair election, and that even the Board's ordinary and extraordinary non-bargaining remedies will not restore to employees their right to choose or reject union representation free from employer coercion; and (2) it is reasonable to conclude that the union would have gained the support of the majority but for the employer's extremely coercive illegal conduct. On this basis, I respectfully dissent.

GINSBURG, *Circuit Judge, dissenting as to the requirement that the Company's president read the Board's notice aloud to assembled employees*: I would modify the extraordinary notice remedies in one respect. The Board's order requires that Conair's President, Leandro Rizzuto, personally read the Board's cease and desist notice to an assembly of employees; I would allow Rizzuto to choose between reading the notice himself or designating a responsible officer to read it on his behalf.

The Board's order specifies that the Company's

> owner and president, Rizzuto, . . . shall . . . read the notice to current employees assembled for that purpose . . . .

Conair Corp., 261 NLRB 1189, 1285 (1982) (ALJ Opinion).

In *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir.), *cert. denied*, 454 U.S. 837 (1981), the Board similarly required that "the [Company] president, Harold Anderson, personally read a copy of the notice to an assembly of the employees." 640 F.2d at 401. Our opinion in that case summarized the history of Board public reading orders (they originated when the illiteracy of employees was a large concern), *id.* at 401-03, and noted the grave reservations this court had earlier expressed regarding such orders in *International Union of Electrical, Radio & Machine Workers v. NLRB (Scott's, Inc.)*, 383 F.2d 230, 232-34 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 904 (1968). *See* 640 F.2d at 402. We enforced the public reading requirement in *Teamsters Local 115* with this modification: we directed the Board to specify as the reader, in lieu of the president, simply "a responsible officer of [the Company]." *Id.* at 403-04.

Teamsters Local 115 is distinguishable from this case. We observed there that "[o]f all the unfair labor practices found by the Board," the president had personally performed "only one." *Id.* at 403. Here, the president's personal involvement was far more conspic-

uous. His voice behind the Board's order might most authoritatively indicate to employees that Conair will comply with the directive. Nonetheless, a reading order "directed at a specified individual" is a "startling innovation." *Id.* Such an order would occasion no surprise in a system in which those who offend against state regulation must confess and repent as a means of self-correction, or to educate others. But it is foreign to our system to force named individuals to speak prescribed words to attain rehabilitation or to enlighten an assembled audience. The Board, I believe, has not thoughtfully considered this point.

A forced, public "confession of sins," even by an owner-president who has acted outrageously, is a humiliation this court once termed "incompatible with the democratic principles of the dignity of man." *International Union of Electrical, Radio & Machine Workers*, 383 F.2d at 234. It has a punitive, vindictive quality, *see Teamsters Local 115*, 640 F.2d at 401, and is the kind of personal performance command equity decrees have avoided. *See* Restatement (Second) of Contracts § 367 (1979); *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853); *cf. Lumley v. Wagner*, 1 DeG., M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852) (acknowledging lack of authority to grant specific performance of defendant's concert singing obligations, court issued injunction preventing defendant from breaching covenant not to sing elsewhere). Moreover, as Board Chairman Van de Water noted, *Conair*, 261 NLRB at 1195 n.28, a reading of the notice by the president may be less effective than a reading by another responsible officer. The former, humiliated and degraded by the personal specific performance order, may demonstrate "by inflections and facial expressions, his disagreement with the terms of the notice." *Id.* The latter, assigned the task but lacking the same personal involvement, may perform it with less distaste, more detachment, and thus with greater credibility. I would not single out the president here, or any other named individual, hand him lines, and make him sing.

GINSBURG, *Circuit Judge, separate concurring statement*: I note as a postscript to the many pages we have written that as a court of review we must wrestle with the "matters of high principle" aired in this case. *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1794 (1983). The point has been made tellingly, however, that "[i]f the law is to have any chance of vindicating the employees' group right to 'bargain collectively through representatives of their own choosing,' the [relief] it promises must come quickly." *Id.* at 1793. We write as 1983 runs out about a unionization campaign that occurred in the spring and summer of 1977. The long delays at every stage of this and similar proceedings may indeed render the Board's remedies, however stiff, "beside the point." *Id.* at 1794 (footnote omitted).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 82-1623

CONAIR CORPORATION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,
Intervenor.

[Filed Jan. 31, 1984]

JUDGMENT

Before: WALD, GINSBURG, and SCALIA, *Circuit Judges.*

THIS CAUSE came on to be heard upon a petition filed by Conair Corporation, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on May 28, 1982, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on July 6, 1983, and has considered the briefs and transcript of record filed in this cause. On November 15, 1983, the Court, being fully advised in the premises, issued its opinion granting in part and denying in part enforcement of the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Petitioner, Conair Corporation, Edison, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees concerning their union activities and sympathies.

(b) Threatening and warning its employees with loss of existing benefits or a reduction thereof if they continue to support or assist Local 222, International Ladies' Garment Workers' Union, AFL-CIO (hereafter called the Union) or any other labor organization.

(c) Soliciting employee grievances and promising that such grievances will be adjusted for the purpose of influencing their selection of a labor organization as their bargaining representative.

(d) Expressly or impliedly promising benefits to its employees to discourage assistance or support of the Union or any other labor organization.

(e) Threatening employees with plant closure and loss of employment if they continue to support or assist the Union or any other labor organization.

(f) Engaging in surveillance of union activity or creating the impression that such activity is subject to surveillance.

(g) Granting employees improved or additional new benefits for the purpose of influencing their selection of a labor organization as their bargaining representative.

(h) Discouraging membership in a labor organization by discharging, refusing to reinstate in a timely fashion or to reinstate at all, or otherwise discriminating against employees in their hire and tenure.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the unfair labor practice strikers listed in Appendix C (copy attached hereto), and Ruby Toomer, Carmen Sagardia, and Jose Santiago, immediate and full reinstatement to their former positions or, if these positions are no longer available, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make whole the reinstated strikers listed in Appendix B (copy attached hereto) for any loss of pay which they may have suffered by reason of their unlawfully delayed reinstatement, and make whole the unfair labor practice strikers unlawfully denied reinstatement listed in Appendix C, employee Jose Santiago (unlawfully discharged on November 10, 1977), employee Ruby Toomer (unlawfully denied reinstatement on January 25, 1978), and employee Carmen Sagardia (unlawfully denied reinstatement on February 23, 1978) for any loss of pay which they may have suffered by reason of the discrimination against them by payment of a sum of money equal to the amount they normally would have earned as wages from the date of their discharge or denial of reinstatement to the date of their actual reinstatement, less any net interim earnings during these respective periods. The backpay due under the terms of the Judgment shall be computed in the manner prescribed by the Board in *F.W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other rec-

ords necessary to analyze the amount of backpay due under the terms of this Judgment.

(d) Mail a copy of the attached notice marked Appendix "A" to each and every employee at his or her home address, post copies thereof at its plant in Edison, New Jersey, and include a copy in appropriate company publications.[1] Copies of said notice, on forms provided by the Regional Director for Region 22 of the National Labor Relations Board (Newark, New Jersey), shall be personally signed by the Petitioner's president and owner "Lee" Rizzuto. Copies of said notice shall be mailed by the Petitioner to each and every employee working at its plant on the date on which such notice is mailed, as well as each and every employee who worked in its plant during the period of the Petitioner's unfair labor practices, and additional copies shall be posted by the Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(e) Publish in local newspapers of general circulation copies of the attached notice marked Appendix "A". Such notice shall be published twice weekly for a period of four weeks.[2]

(f) Convene during working time all employees at its Edison, New Jersey plant, either in shifts or departments, or otherwise, and have the Petitioner's president and owner, "Lee" Rizzuto, read to the assembled employees the contents of the attached notice marked Ap-

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[1] This notice shall be prepared in both English and Spanish, and, where required to be mailed, posted or published, shall be done so in both languages.

[2] This notice shall be published in both English and Spanish.

pendix "A".[3] The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notices.

(g) Upon request of the Union made within one year of the issuance of the Judgment herein, without delay make available to the Union a list of names and addresses of all employees employed at the time of the request.

(h) Immediately upon request of the Union, for a period of two years from the date on which the aforesaid notice is posted, grant the Union and its representatives reasonable access to the plant bulletin boards and all places were notices to employees are customarily posted.

(i) Immediately upon request of the Union, for a period of two years from the date on which the aforesaid notice is posted, permit a reasonable number of union representatives access for reasonable periods of time to nonwork areas, including but not limited to canteens, cafeterias, rest areas, and parking lots, within it Edison, New Jersey plant, so that the Union may present its views on unionization to the employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other nonwork periods.

(j) In the event that during a period of two years following the date on which the aforesaid notice is posted, any supervisor or agent of the Petitioner convenes any group of employees at the Petitioner's Edison, New Jersey plant and addresses them on the question of union representation, give the Union reasonable opportunity to be present at such speech, and, upon request,

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[3] The reading of this notice by Rizzuto if performed in English shall be translated into Spanish and read in that language to the employees by a Spanish interpreter or person fluent in the Spanish language.

give one of them equal time and facilities to address the employees on the question of union representation.

(k) In any election which the Board may schedule at the Petitioner's Edison, New Jersey plant within a period of two years following the date on which the aforesaid notice is posted, and in which the Union is a participant, permit, upon request by the Union, at least two union representatives reasonable access to the plant and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be not more than 10 working days, but not less than 48 hours, prior to any such election.

(l) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply therewith.

/s/ Patricia M. Wald
Circuit Judge
United States Court of Appeals for the
District of Columbia Circuit

/s/ Ruth Bader Ginsburg
Circuit Judge
United States Court of Appeals for the
District of Columbia Circuit

/s/ Antonin Scalia
Circuit Judge
United States Court of Appeals for the
District of Columbia Circuit

APPENDIX A

NOTICE TO EMPLOYEES

Posted Pursuant to a Judgment of the
United States Court of Appeals Enforcing
In Part and Denying In Part an Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities

WE WILL NOT do anything that interferes with, restrains, or coerces employees with respect to these rights. More specifically,

WE WILL NOT discharge or in any other manner discriminate against employees because of their union activities.

WE WILL NOT threaten or warn employees with discharge, loss of benefits, or other reprisals because of their union activities, membership, or support.

WE WILL NOT threaten to close the plant in order to prevent union activities among our employees.

WE WILL NOT discharge or fail or refuse to either reinstate striking employees upon their unconditional application to return to work or fail to do so in a timely fashion.

WE WILL NOT discourage membership or activities on behalf of Local 222, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, by discharging employees or discriminating against them in their hire or tenure.

WE WILL NOT coercively interrogate employees concerning their union membership activities, or support.

WE WILL NOT solicit employee grievances and promise that such grievances will be adjusted.

WE WILL NOT promise or grant improved or additional new economic benefits or other terms or conditions of employment if they abandon their support of a union.

WE WILL NOT create among our employees the impression that their union activities are under surveillance.

WE WILL NOT threaten to never negotiate with a union should it lawfully represent our employees in order to discourage union membership, activities, or support.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Ruby Toomer, Carmen Sagardia, Jose Santiago, and all the unfair labor practice strikers listed in Appendix C immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions.

WE WILL pay Ruby Toomer, Carmen Sagardia, Jose Santiago, and all the employees and unfair labor practice strikers listed respectively in Appendices B and C for any earnings they lost as a result of our discrimination against them, plus interest.

WE WILL send to all our employees copies of this notice; WE WILL read this notice to all our employees; and WE WILL publish copies of this notice in local newspapers.

WE WILL, upon request of the Union made within 1 year of issuance of the Board's Decision and Order, make available to the Union a list of names and addresses of all our employees currently employed.

WE WILL, immediately upon request of the Union, grant the Union and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted.

WE WILL, immediately upon request of the Union, grant the Union and its reprentatives reasonable access to our plant in nonwork areas during employees' nonworktime in order that the Union may present its views on unionization to employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other nonwork periods.

WE WILL, if we gather together any group of our employees on worktime at our plant and speak to them on the question of union representation, give the Union reasonable notice and give two union representatives a reasonable opportunity to be present at such speech and, on request, give one of them equal time and facilities also to speak to you on the question of union representation.

Our employees have the right to join Local 222, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, or to refrain from doing so.

CONAIR CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peter D. Rodino Jr. Federal Building, Room 1600, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-3652.

APPENDIX B

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Lucille Allen	October 4, 1977
Mario Arocho	October 4, 1977
Rosita Cruz	October 4, 1977
Christina De Armas	October 4, 1977
Florence L. Heimbuch	October 4, 1977
Carmen Irizzarry	October 4, 1977
Florence F. Jacko	October 4, 1977
Beulah Jones	October 4, 1977
Flora F. Kurtanick	October 4, 1977
Dorothy Lodato	October 4, 1977
Victor Maisonet	October 4, 1977
Irene Martinez	October 4, 1977
Laura Martinez	October 4, 1977
Miliady Mendez	October 4, 1977
Milagros Muniz	October 4, 1977
Luis B. Ortiz	October 4, 1977
Yillian T. Perez	October 4, 1977
Olga Rios	October 4, 1977
Ana Santiago	October 4, 1977
Carmen M. Sagardia	October 4, 1977
Rosaura Soto	October 4, 1977
Ismael Torres	October 4, 1977
Verta May Allen	October 11, 1977
Hector Caraballo	October 11, 1977
Hilda Della Torre	October 11, 1977
Margarita Gautier	October 11, 1977
Carmen Lopez	October 11, 1977
Luz M. Melendez	October 11, 1977
Hilda Perez	October 11, 1977
Alicia Rivera	October 11, 1977
Jose R. Rivera	October 11, 1977
Genovena Arocho	October 12, 1977
Olga Chalfa	October 12, 1977
Patricia Eaford	October 12, 1977

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Rosaria Machin	October 12, 1977
Rosalia Mendez	October 12, 1977
Jose Negron	October 12, 1977
Antonio Neiro	October 12, 1977
Julia Pellallera	October 12, 1977
Lilia Quiles	October 12, 1977
Awilda Rodriguez	October 12, 1977
Jose Santiago	October 12, 1977
Aida Iris Torres	October 12, 1977
Alberto Vargas	October 12, 1977
Elsie Vega	October 12, 1977
Adamina Nieves	October 14, 1977
Virginia Rivera	October 14, 1977
Rufino Saez	October 14, 1977
Portinia Soto	October 14, 1977
Rafael Valdes	October 14, 1977
Mayes Garcia	October 18, 1977
Gloria Guzman	October 18, 1977
Juan Hernandez	October 18, 1977
Roberto Mercado	October 18, 1977
Elizabeth Muniz	October 18, 1977
Wildilia Santiago	October 18, 1977
Sonia Torres	October 18, 1977
Felix Vasquez	October 18, 1977
Miguel Aquino	October 19, 1977
Celia Cruz	October 19, 1977
Celia Febles	October 19, 1977
Wilfredo Guerrero	October 19, 1977
Alice Jones	October 19, 1977
Noraima Mendez	October 19, 1977
Martha Parada	October 19, 1977
Jose Vazquez	October 19, 1977
Wilfredo Vazquez	October 19, 1977
Etta Burns	October 24, 1977
Hiriam Guzman	October 24, 1977
Carmen Sanson	October 24, 1977

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Alida Pabon	October 25, 1977
Michael Billings	November 2, 1977
Dominga Cruz	November 2, 1977
Martha Davison	November 2, 1977
Evelyn Lee	November 2, 1977
Annette Palmer	November 2, 1977
Denise Perrotte	November 2, 1977
Raymond Crespo	November 7, 1977
David Letendre	November 7, 1977
Richard Letendre	November 7, 1977
Ana Rose Fernandez	November 7, 1977

APPENDIX C

UNFAIR LABOR PRACTICE STRIKERS NOT REINSTATED

Shirley Bagby
Yvette Casquette
Lydia Gonzales
Enrique Luciano
Jose R. Mendez
Adolfo Nunez
Jose Nunez
Stephen Olah
Adrian Pagan
Gertrudes U. Rodriguez
Jesus Santiago
Ernesto Soto
Luz C. Villanueva

APPENDIX C

VFJZH

261 NLRB No. 178

D-8878
Edison, NJ

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 22-CA-7586,
22-CA-7672,
22-CA-7939,
22-CA-8173,
22-CA-8220,
22-CA-8238, and
22-RC-7119

CONAIR CORPORATION

and

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

DECISION AND ORDER

On July 30, 1980, Administrative Law Judge Jesse Kleiman issued the attached Decision in this proceeding. Thereafter, Respondent, the Charging Party, and the General Counsel filed exceptions and supporting briefs.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We also dismiss as lacking in merit Respondent's motion to disqualify the Administrative Law Judge, vacate his Decision, and have a hearing *de novo*. Respondent contends that the Administrative Law judge should be disqualified because his Decision was prejudiced by statements made by Respondent's counsel at a settlement conference. Subsequent to the close of the hearing but prior to the issuance of the Administrative Law Judge's Decision, the parties made an attempt to settle the case and, in furtherance of their settlement attempt, they requested the Administrative Law Judge to attend a settlement conference. All of the parties attended the conference and were represented by counsel. The parties, however, were unable to agree upon a settlement, and in due course the Administrative Law Judge issued his Decision. At the settlement conference, Respondent's counsel informed the other participants that, because of economic changes unrelated to the issues involved in this case, Respondent planned to move a significant part of its New Jersey operations to its Hong Kong facility. Respondent now contends that its own post-hearing statement made in the course of settlement discussions unduly prejudiced the Administrative Law Judge and influenced the Administrative Law Judge's finding that Respondent had repeatedly threatened to move its operations to Hong Kong if the employees supported the Union, and that it also prejudiced the Administrative Law Judge's credibility resolutions which underlay many of his other findings that Respondent had violated the Act. Upon our full consideration of the record and the Administrative Law Judge's Decision, we find no evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated a bias against Respondent in his analysis or discussion of the evidence.

of the Administrative Law Judge only to the extent consistent herewith,[3] and to adopt his recommended Order as modified.

The Administrative Law Judge found, and we agree, that Respondent reacted to its employees' organizational activities by violating the Act on numerous occasions and that Respondent's unfair labor practices were outrageous and pervasive violations of Section 8(a)(1) and (3) of the Act. The General Counsel and the Charging Party filed exceptions contending that the Administrative Law Judge erred by failing to find that Respondent violated Section 8(a)(3) and (1) of the Act on April 22, 1977,[4] by unlawfully discharging all of its employees who had been engaged in an unfair labor practice strike and that the Administrative Law Judge further erred by failing to find that Respondent's unlawful conduct warranted the issuance of a bargaining order.

As found by the Administrative Law Judge, the record establishes that in late March or early April 1977 the Union began an organizational campaign at Respondent's New Jersey plant. In response thereto, Respondent's officials embarked upon a course of conduct designed to intimidate and undermine its employees' support for the Union. As detailed in the Administrative Law Judge's Decision, Respondent's officials violated the Act on numerous occasions by promising benefits to its employees

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[3] In the absence of record evidence indicating that Respondent was responsible for the posting, or was aware of the existence of, signs in the restrooms which threatened plant closure, we do not adopt the Administrative Law Judge's findings that those signs violated Sec. 8(a)(1) of the Act. In addition, in accordance with the General Counsel's unopposed request, we have noted certain typographical errors in the Administrative Law Judge's Decision, and those errors will be corrected in the published volume.

[4] Unless otherwise indicated, all dates hereafter refer to 1977.

and by threatening its employees with a loss of benefits and threatening plant closure and other adverse consequences if the employees supported or sought assistance from the Union. In response to these serious unfair labor practices, the Union, with substantial employee support, commenced a strike on April 11. The Administrative Law Judge found, and we agree, that the strike was in response to Respondent's numerous unfair labor practices and hence that from its inception it was an unfair labor practice strike.

On April 20, Respondent sent mailgrams to each of its striking employees, stating as follows:

> We have called you repeatedly to return to your job, despite your promises to do so, you have failed to report for duty, there is no violence, employees freely enter the plant. Unless you report for work on Friday, April 22, 1977, at your regular starting time you will be deemed to have voluntarily quit your job.

We agree with the Administrative Law Judge's finding that the mailgram violated Section 8(a)(1) of the Act by explicitly threatening the strikers with discharge if they continued to exercise their protected concerted right to engage in a strike protesting Respondent's unfair labor practices.

The General Counsel and the Charging Party contend that the Administrative Law Judge erred by failing to find that the April 20 mailgram also violated Section 8(a)(3) and (1) of the Act by unlawfully terminating the striking employees because of their involvement in protected concerted activity. We agree.[5] Initially, we

[5] In its brief in response to the exception of the General Counsel and the Charging Party Respondent contends that the complaint does not allege that the April 20 mailgram terminated the strikers in violation of Sec. 8(a)(3) and (1) of the Act and therefore the Board cannot now find that the mailgram violated Sec. 8(a)(3) and (1). Although Respond-

note that the clear language of the mailgram establishes Respondent's intention to terminate the strikers because of their involvement in strike activities.[6] Further, if the strikers had any doubts as to their employment status after April 22, Respondent's subsequent conduct clearly established that they had in fact been discharged on April 22. Thus, Respondent admitted that it deemed its striking employees to have quit their jobs when they did not report for work in response to the mailgrams. In addition, on June 9, Respondent sent its striking employees a letter which offered the employees reinstatement to their former jobs "if" they unconditionally abandoned the strike immediately. Finally, when the strikers began returning to their jobs in October and November, they were told that they were new hires and "new hires" was written on their timecards. Accordingly, we find that

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ent asserts that it had no notice that the April 20 mailgram would be litigated as a violation of Sec. 8(a)(3), the complaint specifically alleges that the mailgram threatened employees with discharge in violation of Sec. 8(a)(1), and other paragraphs of the complaint allege that other conduct by Respondent violated Sec. 8(a)(3). Further, in its exceptions, Respondent argues that the law and the interpretation of the facts now in the record do not support the finding of a violation. Respondent does not argue that it was precluded from adducing any exculpatory facts or that it would have altered its presentation of the case in any manner. Accordingly, we find no merit to Respondent's contentions since the issue was fully litigated and all of the operative facts underlying the finding of an 8(a)(3) and (1) violation are present in the record. *Southern Newspapers, Inc., d/b/a The Baytown Sun*, 255 NLRB No. 22 (1981), and cases cited therein at fn. 1.

[6] Even if we were to find that the language of the mailgram had created an ambiguity regarding the strikers' employment status, the burden of the results of that ambiguity must fall on Respondent. Thus, viewing the mailgram from the perspective of the striking employees, we find that the mailgram conveyed the message that, if the employees did not abandon the strike and report to work by April 22, they would no longer be in Respondent's employ. *Pennypower Shopping News, Inc.*, 253 NLRB 85 (1980).

Respondent's April 20 mailgram was an unlawful attempt to break the strike by conditioning the strikers' continued employment upon the abandonment of their protected right to engage in an unfair labor practice strike and that Respondent unlawfully discharged its striking employees on April 22 in violation of Section 8(a)(3) and (1) of the Act.[7]

In view of our finding that the strikers were unlawfully discharged on April 22, we further find that they were under no obligation to seek reinstatement. As set forth in *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979), unlawfully discharged strikers are treated in the same manner that other discriminatorily discharged employees are treated; discharged strikers are not required to request reinstatement in order to activate an employer's backpay obligation. Thus, an unlawful discharge triggers a backpay obligation where through its words and/or action an employer causes its "employees reasonably to believe that they had been discharged or that their continued employment status was questionable, because of their participation in protected concerted activity . . . ."[8] Accordingly, we have modified the Administrative Law Judge's remedy to conform to our additional finding that Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging its striking employees on April 22, 1977.

As set forth fully in the attached Decision, the Administrative Law Judge found that Respondent committed extensive unfair labor practices from early April through the election on December 7, 1977. These violations of the Act included: Numerous threats of plant closure, discharge, and loss of benefits; numerous promises of increased or new benefits; coercive interrogation of em-

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[7] *Accurate Die & Manufacturing Corp.*, 242 NLRB 280 (1979), and *Pennypower Shopping News, Inc., supra.*

[8] *Pennypower Shopping News, Inc., supra* at 85.

ployees; numerous acts of soliciting employee grievance with promises to remedy the same; grants of numerous benefits to employees; creating the impression of surveillance; the failure to give timely reinstatement to 36 unfair labor practice strikers; and the outright discharge and refusal to reinstate 16 other unfair labor practice strikers. We agree with the Administrative Law Judge's findings of violations and with his conclusion that those unfair labor practices committed during the critical preelection period constituted objectionable conduct sufficient to warrant setting aside the election.[9]

The Administrative Law Judge further found that Respondent's unfair labor practices were so "outrageous" and "pervasive" as to fall within the first category of unfair labor practice cases described in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 613-617 (1969). In sum, the Administrative Law Judge found that Respondent's conduct presented the "exceptional" case where the coercive effect of the unfair labor practices "cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." Although the Court indicated in *Gissel* that a first category case justified the issuance of a remedial bargaining order "without need of inquiry into majority status on the basis of cards or otherwise," [10] the Admin-

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[9] In addition, as set forth above, we have further found that Respondent violated Sec. 8(a)(3) by its mass discharge of strikers on April 22, 1977.

[10] The *Gissel* opinion described two other categories of unfair labor practices cases. The second category consists of "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." The Court expressly approved the Board's use of a remedial bargaining order in second category cases where the union at one time had majority support and "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies,

istrative Law Judge found that the Union had failed to establish that it had at any time obtained a clear showing of support from a majority of Respondent's employees and he therefore declined to recommend that Respondent be ordered to recognize and upon demand bargain with the Union as the exclusive bargaining representative of Respondent's employees. In so doing, the Administrative Law Judge discussed *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979), and noted that there the Board was presented with facts similar to those of the instant case wherein unfair labor practices committed by a respondent-employer had been outrageous and pervasive, but the Board nevertheless declined to issue a bargaining order because the union therein had failed to obtain a card majority.[11]

Subsequent to the issuance of the Administrative Law Judge's Decision in this case, the United States Court of Appeals for the Third Circuit enforced the Board's Order in *United Dairy Farmers Cooperative*,[12] and further

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though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." The third category of unfair labor practices described in *Gissel* consists of "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." 395 U.S. at 613-615.

[11] In the plurality opinion which became the basis of the Board's Order, former Members Murphy and Truesdale recognized that the Board "may" have the authority to issue a bargaining order in the absence of a card majority, but judged that the facts of that case did not warrant such an order. Former Member Penello, concurring and dissenting, concluded that the Board lacked the authority to issue a bargaining order where a union had been unable to obtain a card majority. Then Chairman Fanning and Member Jenkins, concurring and dissenting, found that the Board possessed the authority to issue such a bargaining order in appropriate circumstances, and further found that a bargaining order was warranted in the circumstances of that case.

[12] 633 F.2d 1054 (3d Cir. 1980).

found that the Board possesses the authority to issue a nonmajority bargaining order in exceptional cases where a respondent's "outrageous" and "pervasive" unfair labor practices eliminated any reasonable possibility of holding a free and uncoerced election. Accordingly, the court remanded the case and directed the Board to consider whether a bargaining order should issue in that case. The Board accepted the remand and in a Supplemental Decision and Order found that the respondent's outrageous and pervasive unfair labor practices had "completely foreclosed the possibility of a fair election" [13] and that therefore, even though the union had failed to demonstrate majority support, a bargaining order was warranted and justified.[14]

Accordingly, in light of this precedent, we have carefully reviewed the facts of this case. Although the Administrative Law Judge's well-reasoned Decision set forth in voluminous detail Respondent's outrageous and pervasive unlawful conduct, we find it appropriate to review briefly the salient events in order to present a perspective on Respondent's unlawful conduct. As indicated earlier, in late March 1977, the Union began organizing Respondent's production and maintenance employees. Almost immediately thereafter, Respondent's officials embarked upon a course of conduct designed to intimidate and undermine its employees' support for the Union. Thus, in early April Respondent began holding a series of meetings with its employees in large and in small groups.[15]

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[13] 257 NLRB No. 129 (1981), sl. op. at p. 11.

[14] Then Chairman Fanning and Member Jenkins adhered to their position, as set forth in the original Decision and Order in that proceeding, that the Board possesses the authority to issue a nonmajority bargaining order. Member Zimmerman respectfully recognized the Third Circuit's decision as binding upon the Board for the purpose of deciding that case.

[15] The meetings were unprecedented and were a marked departure from Respondent's past practice; additionally, the

The meetings were held prior to the strike, during the strike, and during the post-strike period up to the representation election on December 7. At these meetings and on numerous occasions, Respondent's executive and lower ranking supervisors threatened employees with plant closure, discharge, and loss of benefits if they continued to support the Union. Respondent also made numerous promises of increased or new benefits, solicited grievances, and made implied and explicit promises to remedy those grievances. In addition, Respondent interrogated many of its employees about their union activities and created the impression that its employees' union activities were under surveillance.

Within several days of April 4, the date that Respondent began its unfair labor practices, a group of employees (25-30) appeared at the union hall and requested the return of their signed authorization cards because they feared losing their jobs. The employees explained to the union agents that Respondent had threatened plant closure, discharges, loss of benefits, and other dire consequences if they continued to support the Union. The union officials responded that such conduct violated the National Labor Relations Act and that the employees could strike in protest of Respondent's unfair labor practices. The employees responded enthusiastically to the suggestion of a strike, and, on April 11, the Union, with substantial employee support, commenced a strike action. As indicated previously, we have found that the strike was an unfair labor practice strike from its inception until its cessation on September 23.

In response to the strike, Respondent escalated its campaign of unfair labor practices. As set forth earlier,

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manner in which the meetings were conducted constituted an attempt to solicit employee grievances and indicated that those grievances would be satisfied. We agree with the Administrative Law Judge that such conduct violated Sec. 8(a)(1) of the Act.

Respondent threatened to discharge strikers and, on April 22, it carried out its threat and unlawfully terminated all of the unfair labor practice strikers because of their involvement in protected concerted activity. In addition, Respondent repeated its threats of discharge and plant closure on a number of occasions during the course of the strike. Respondent also interrogated employees about their union activities, and by interrogations, statements, and videotaping of the strike action, Respondent created the impression that the employees' union activities were under surveillance. At the same time, Respondent offered increased benefits and better working conditions to nonstriking employees. When a number of strikers attempted to return to their jobs, Respondent treated them as new employees and required them to sign papers waiving their Section 7 rights. The employees, however, refused to return to work under those unlawful conditions, and Respondent again violated the Act by treating them as if they had abandoned their employment.

When the Union called an end to the strike and unconditionally requested Respondent to reinstate immediately the discharged strikers, Respondent instituted a discriminatory reinstatement policy and again violated Section 8(a)(3) of the Act. Thus, instead of offering the discriminatorily discharged strikers immediate reinstatement, Respondent slowly reinstated the discharged strikers over a 6-week period while continuing to employ its strike replacements. Further, when the discharged strikers were reinstated, they were treated as new hires and were not permitted to retain their seniority which entitled them to better working conditions, privileges, and benefits. Respondent also refused reinstatement to a number of discharged strikers, allegedly because of their involvement in strike misconduct. We agree with the Administrative Law Judge that Respondent did not have a reasonable basis for believing that these strikers had engaged in strike misconduct and that refusal to

offer them reinstatement violated Section 8(a)(3) of the Act. Finally, in November, Respondent discharged a previously reinstated striker because of his prior involvement in the strike and, after the election, Respondent discharged two other previously reinstated strikers because of their support for the Union.

As the election date neared, Respondent intensified its unlawful activity. Respondent continued to solicit grievances and implicitedly and explicitedly promised to remedy those grievances. Respondent also implemented better working conditions and made further promises of increased benefits. The number of its unlawful interrogations and threats also increased. For example, several weeks before the election, employees participating in Respondent's profit-sharing plan were given a "Statements of Accounts" with a message stamped on the front page which indicated that the profit-sharing plan was not for union members. Finally, in attempt not to leave anything to chance, posters and printed literature indicating that union members would not receive a Christmas bonus and that if the Union won the election Respondent would close the plant and move to Hong Kong were posted throughout the plant in work areas, the cafeteria, and hallways.

In *United Dairy II*, the Board identified the "gravity, extent, timing, and constant repetition" [16] of violations found as the interrelated factors to be examined in determining whether a respondent employer's unlawful conduct was so "outrageous' 'and "pervasive" as to fall within the first *Gissel* category of "exceptional" cases.

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[16] 257 NLRB No. 129, sl. op., p. 11. In addition to focusing on repetition of specific unfair labor practices within a single case, the Board noted that recidivism is an important element to be weighed. It is not, however, a prerequisite to placing an employer's conduct in the first *Gissel* category. In the instant case, there is no evidence that Respondent engaged in unfair labor practices predating those described above.

Such an examination here compels the finding that Respondent's opprobrious conduct clearly belongs in the first *Gissel* category.

There can be no doubt of the extreme gravity of Respondent's violations of the Act. In particular, the numerous discriminatory discharges are serious unfair labor practices which go "to the very heart of the Act" and have a lasting coercive impact on employees.[17] Respondent discharged all unfair labor practice strikers within 3 weeks of learning about the Union's nascent organizational campaign in April. This mass discharge imparted in dramatic fashion the unmistakable message that loss of employment was the price to be exacted for the exercise of Section 7 rights. In subsequent months, Respondent reinforced and embellished this coercive message by repeatedly threatening discharge, by discriminatorily refusing reinstatement to some discharged strikers, by discriminatorily delaying reinstatement of other strikers, by discriminatorily discharging reinstated strikers, and by repeatedly threatening plant closure in retaliation against the Union's campaign. Moreover, these unfair labor practices were only the most serious among the many committed by Respondent.[18]

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[17] See, e.g., *United Dairy II*, *supra* at sl. op., p. 8, and cases cited there.

[18] Even under the dissenters' view that we are precluded from considering whether Respondent's mailgram unlawfully discharged the striking employees on April 22, the coercive impact of the mailgram's threat to discharge remains virtually the same. Moreover, even in the absence of the April 22 discharge finding, Respondent's numerous unfair labor practices reached the highest level of severity. Compare *The Sinclair Company* v. *N.L.R.B.*, 395 U.S. 575 (1969), a case consolidated with *Gissel* for consideration by the Court. In *Sinclair*, the respondent's president unlawfully threatened all employees with plant closure on five separate occasions during an organization and election campaign. The Court indicated that these five 8(a)(1) violations alone were sufficiently "outrageous" and "pervasive" to warrant classification in the first *Gissel* category.

Respondent's unlawful conduct carried its coercive message to every employee in the relatively large unit. Respondent's highest executive officials openly committed many unfair labor practices, enhancing the impression of a centrally coordinated, companywide plan to deny employees their Section 7 rights and increasing the likelihood that all employees would understand and credit any threats made. In addition, officials at all levels of Respondent's managerial hierarchy utilized mass communications with employees to insure maximum dissemination of unlawful threats, solicitation of grievances, and promises of benefits.

Finally, both the repetition and timing of Respondent's unfair labor practices exacerbated their long-term coercive impact. The chilling effect on employee rights of a single discharge or threat of plant closure is difficult enough to erase. Several repetitions of these and other violations of the Act multiply the strength and duration of the impression left on employees. The same multiplier effect results from the manner in which Respondent timed its unlawful conduct—i.e., swift and severe initial retaliation against the Union's organizational efforts, a lengthy campaign of unfair labor practices, an increase in violations as the election neared, and two unlawful discharges even after the election. In moment and duration, the timing of Respondent's unfair labor practices underscored its enduring resolve to oppose unionization by any means and deeply imprinted on employee memories the drastic consequences of seeking union representation.

It is clear from the foregoing that this case is the "exceptional" type envisioned in *Gissel* which warrants the insurance of a remedial bargaining order "without need of inquiry into majority status on the basis of cards or otherwise." We find that neither our traditional remedies nor even our extraordinary access and notice remedies can effectively dissipate the lingering effects

of Respondent's massive and unrelenting coercive conduct. By this conduct Respondent has foreclosed any possibility of holding a fair representation election. Under these exceptional circumstances, we find that a remedial bargaining order is the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization. Anything short of a bargaining order would deny employees that right which has been the hallmark of national labor policy for nearly five decades.

We categorically reject our dissenting colleagues' arguments that either the Act or Board policy bars issuance of a nonmajority bargaining order in this case. Their view of the Board's remedial authority lacks any direct judicial support[19] and errs by focusing so narrowly and abstractly on the principle of majority rule. That principle is, unquestionably, an important feature of the Act, but it has never been interpreted as standing

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[19] Reviewing judicial precedent, the Third Circuit stated in *United Dairy* that "Although several commentators have observed that the [*Gissel*] Court did not specifically endorse the issuance of bargaining orders in the absence of a card majority, virtually every court that has discussed the issue has stated that a bargaining order may be issued in the absence of a card majority." 633 F.2d 1054, 1066, and see cases cited there. Although the D.C. Circuit indicated some reservations about the propriety of a nonmajority bargaining order in *Teamsters Local 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Haddon House Food Products, Inc. and Flavor Delight, Inc.*] v. *N.L.R.B.*, 640 F.2d 393 (1981), cert. denied, 102 S.Ct. 141, 92 LC ¶ 13,018 (1981), it expressly reserved from deciding the issue. See also *Local 57, International Ladies' Garment Workers' Union, AFL-CIO* [*Garwin Corporation*] v. *N.L.R.B.*, 374 F.2d 295 (D.C. Cir. 1967); *New York Hotel and Motel Trades Council* [*F.W.I.L. Lundry Bros. Restaurant, Inc.*] v. *N.L.R.B.*, 109 LRRM 2779 (D.C. Cir. 1982).

in supreme isolation from the Board's other statutory policies and purposes.[20]

Furthermore, we reject our colleagues' assertion that their position best protects the principle of majority determination. Neither they nor we can state with complete certainty whether a majority of Respondent's employees actually desired representation by the Union prior to the onset of Respondent's unfair labor practices. Neither they nor we could predict with total certainty the outcome of the Union's organizational campaign if Respondent had not repeatedly and illegally interfered. The record reveals only that approximately 46 percent of the employees had at one time openly expressed their support for the Union by signing authorization cards.[21] There is no indication of the degree of antiunion sentiment among the employees at that time. Of paramount significance, however, is the fact that, but for Respondent's unlawful conduct, its employees would have had the opportunity to express openly their opinions about unionism and to resolve the representation debate by making a free and uncoerced majority choice in a Board-conducted election. Respondent, by the massive and numerous violations discussed above, has destroyed any opportunity for free and open debate of the representation question. Our dissenting colleagues attempt to cloak their tolerance of Respondent's actions in a defense of majoritarian principle. We reject that masquerade. It is

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[20] See, e.g., *N.L.R.B.* v. *Gissel Packing Co., supra; N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324 (1946); *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702 (1944); *Pinter Bros., Inc.*, 227 NLRB 921 (1977); *Piper Industries, Inc., Plastic Products Division*, 212 NLRB 474 (1974).

[21] We have not resolved the challenges to each and every authorization card or to the eligibility of every voter because no resolution was necessary to decide the issues presented here. It is clear, however, that the figures set forth by the Administrative Law Judge in fn. 501 of his Decision are at least accurate approximations.

they, not we, who accept and perpetuate Respondent's denial to employees of their right to determine for themselves whether or not to be represented.

We remain convinced that the correct view of *Gissel*, including the proper exercise of the Board's remedial authority, and the most effective application of majoritarian principles is that expressed by then Chairman Fanning and Member Jenkins in the original *United Dairy* Decision, endorsed by the United States Court of Appeals for the Third Circuit, and followed by the Board in *United Dairy II*. Specifically, in the exceptional *Gissel* category 1 case, we find that the risk of imposing a minority union on employees for an interim remedial bargaining period is greatly outweighed by the risk that, without a bargaining order, all employees would be indefinitely denied their statutory right to make a fair determination whether they desire union representation. "There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a decertification petition." *N.L.R.B.* v. *Gissel*, *supra* at 613.

Whether or not we order bargaining, the employees, as even the dissent must admit, will have lost their right to select a bargaining representative by virtue of the employer's unfair labor practices. We recognize that the right to reject representation must be balanced against the right to select representation. As the Supreme Court has said of the analogous conflict between organizational and property rights, "Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." [22] Accordingly, a remedial bargaining order, rather than the remedies advocated by the dissent, best vindicates the employees' right of self-determination. No other remedy will

[22] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1955).

as quickly and effectively provide the opportunity for employee free choice which the Act mandates us to protect.

Moreover, in concluding that a bargaining order is warranted here, we note that the risk of even temporarily contravening the wishes of an employee majority is lessened by the Union's quondam card showing of support from approximately 46 percent of Respondent's employees. Even after bearing the brunt of Respondent's misconduct for nearly 9 months, approximately one-third of participating voters still cast ballots for the Union. Accordingly, we find that here, as in *United Dairy*, a reasonable basis exists for concluding that the Union would have enjoyed majority support but for Respondent's unfair labor practices.

We would not, however, necessarily withhold a bargaining order in the absence of a close election vote, a high majority percentage card showing, or any other affirmative showing of a reasonable basis for projecting a union's majority support. The critical predicate to issuance of a nonmajority bargaining order is the Board's finding, based on the factors previously enumerated, that an employer's unlawful conduct fits the *Gissel* category 1 description.[23] A bargaining order to remedy conduct in this category may well be warranted "without need of inquiry into majority status on the basis of cards or otherwise." This statement by the *Gissel* Court implicitly presumes that, in the absence of unfair labor practices, the issue of union representation remains in reasonable doubt and subject to the persuasive forces of employees

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[23] Contrary to Member Hunter's dissenting opinion, we perceive no great difficulty in objectively distinguishing the "exceptional" *Gissel* category 1 case from cases involving less serious unfair labor practices. Compare the instant case with *United Supermarkets, Inc.*, 261 NLRB No. 179, issued this same day, wherein the Board has found a nonmajority bargaining order inappropriate.

exercising their Section 7 rights until employees definitively reject representation by failing to give majority support to a union in a fair election. Accordingly, if an employer's "outrageous" and "pervasive" unfair labor practices have completely foreclosed the possibility of a fair representation election, the Board will issue a nonmajority remedial bargaining order because it is the only effective means of restoring employee's representational rights.

Finally, we note that Respondent commenced its unlawful campaign on April 4, 1977, by threatening plant closure and loss of benefits if its employees supported the Union. In accordance with our established practice,[24] and in order to prevent any intervening unilateral changes from going unremedied, we shall impose the bargaining obligation on Respondent as of April 4, 1977.

Amended Conclusions of Law

Insert the following as Conclusion of Law 4:

"4. By unlawfully discharging its striking employees on April 22, 1977, and by failing and refusing to timely reinstate the employees listed in Appendix B; by unlawfully discharging its striking employees on April 22, 1977, and by failing and refusing to reinstate at all the employees listed in Appendix C; and by subsequently discharging and failing and refusing to reinstate Ruby Toomer, Carmen Sagardia, and Jose Santiago, all because they had engaged in union or other protected concerted activity, with the intent to discourage unit employees from engaging in protected concerted activity Respondent has engaged in unfair practices in violation of Section 8(a)(3) and (1) of the Act."

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[24] See *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977). For the reasons expressed in his concurring opinion in that case, in addition to the fact that this order is remedial only, Member Fanning would make the bargaining order prospective only.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Conair Corporation, Edison, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified: [25]

1. Substitute the following for paragraphs 2(a) and (b):

"(a) Offer the discharged unfair labor practice strikers listed in Appendix C, and Ruby Toomer, Carmen Sagardia, and Jose Santiago, immediate and full reinstatement to their former positions or, if these positions are no longer available, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

"(b) Make the employees listed in Appendix B, the discharged unfair labor practice strikers in Appendix

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[25] In setting forth his recommended order, the Administrative Law Judge noted that the nature and extensiveness of Respondent's unfair labor practices rendered the Board's conventional remedies insufficient to dissipate the effects of Respondent's outrageous and pervasive conduct. In fn. 530 of his Decision, however, the Administrative Law Judge indicated that certain provisions of his recommended Order would be applicable only so long as an appropriate certification did not issue. We agree with the Administrative Law Judge's analysis that an extraordinary remedy is needed to dissipate the effects of Respondent's unlawful conduct. However, we find no reason to limit any of the provisions of the Order because of the issuance of a certification or because we have issued a bargaining order. Accordingly, in adopting the Administrative Law Judge's recommended Order, as modified, we do not adopt his fn. 530. See the Supplemental Decision and Order in *United Dairy Farmers Cooperative Association*, 257 NLRB No. 129.

C, and the subsequently discharged employees Ruby Toomer, Carmen Sagardia, and Jose Santiago whole for any loss of pay which they may have suffered by reason of the discrimination against them by payment of a sum of money equal to the amount they normally would have earned as wages from the date of their discharge to the date of their actual reinstatement, less any net interim earnings during these respective periods. The backpay due under the terms of the recommended Order shall computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)." [26]

2. Insert the following as paragraph 2(m):

"(m) Upon demand recognize Local 22, International Ladies' Garment Workers' Union, AFL-CIO, as the exclusive representative of all employees included in the unit found appropriate in Case 22-RC-7119, and bargain with that Union in good faith, and, if an understanding is reached, embody it in a signed agreement."

3. Substitute the attached notices for those of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election held on December 27, 1977, in Case 22-RC-7119, be, and it hereby is, set aside.

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[26] With respect to the backpay involved, Member Jenkins would compute the interest in accordance with the formula set forth in his partial dissent in *Olylmpic Medical Corporation*, 250 NLRB 146 (1980).

Dated, Washington, D.C. May 28, 1982

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

DON A. ZIMMERMAN, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

CHAIRMAN VAN DE WATER, concurring in part and dissenting in part:

I cannot join my colleagues in issuing a bargaining order in violation of the majority rule principle which lies at the heart of the statutory scheme and our democratic society. Rather, I agree with former Member Penello that the "[h]oldings of the Supreme Court, the plain words of the statute, and its legislative history . . . establish that the Board's remedial authority is limited by the majority rule doctrine."[27] But even if the Board did not lack the requisite statutory authority, I could not conclude that employee free choice is best effectuated by imposing a labor organization upon employees without their consent. Recognizing that the Board's conventional remedies are not adequate to insure that a second election would be concluded in an atmosphere free from the coercive effects of Respondent's egregious misconduct, I join my colleagues in granting extraordinary remedies other than a bargaining order.[28]

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[27] *United Dairy Farmers Cooperative Association*, 242 NLRB 1026, 1038 (1979) (Member Penello, concurring in part and dissenting in part), remanded 633 F.2d 1054 (3d Cir. 1980), decision on remand 257 NLRB No. 129 (1981).

[28] With regard to the merits, I agree with all but one of the majority's unfair labor practice findings. For the reasons stated by Member Hunter in his separate opinion, I believe that the issue of whether Respondent unlawfully discharged its striking employees was not fairly and fully litigated.

With regard to the extraordinary remedies short of a bargaining order imposed by my colleagues, I note that these measures were recently upheld, with one modification, by the District of Columbia Circuit. *Teamsters Local 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Haddon House Food Products, Inc. and Flavor Delight, Inc.]* v. *N.L.R.B.*, 640 F.2d 392 (1981), cert. denied, 102 S.Ct. 141, 92 LC ¶ 13,018 (1981). The court disagreed with the provision requiring that the notice be read by the respondent's owner and substituted "a responsible officer of Respondent." With this modification, I join in granting the extraordinary remedies in this case. In

In the *United Dairy* case, former Member Penello stood alone, as he was the only one who concluded that the Board lacked the statutory authority to issue a bargaining order in favor of a union that never commanded majority support. His separate opinion is too lengthy to quote in full and too well stated to summarize effectively. Suffice it to say that I subscribe fully to the views expressed in parts I and II of his opinion. In part I, former Member Penello analyzed the Supreme Court's decision in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), and concluded that "even under the interpretation of *Gissel* most favorable to [his colleagues], all that can fairly be said is that the Court left open the issue of whether the Board has the statutory authority to issue a bargaining order in the absence of a showing that the union ever enjoyed majority support." Former Member Penello discussed that issue fully in part II of his opinion. On the basis of his review of the statute's provisions, particularly Section 9(a), the Act's legislative history, and interpretative Supreme Court decisions, he reached the conclusion, with which I completely agree, that "if a labor organization is to become a bargaining representative in the absence of a showing of majority support, the decision must be made by Congress, the body which constructed the Act with the majority rule principle as its foundation."

On petitions for review and cross-application of enforcement, the Third Circuit held in *United Dairy* that "the Board has the remedial authority to issue a bargaining order in the absence of a card majority and election victory if the employer has committed such 'outrageous' and 'pervasive' unfair labor practices that there is no

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my opinion, a reading of the notice by a responsible officer other than Respondent's owner may be more effective because the latter is more likely to demonstrate, by inflections and facial expressions, his disagreement with the terms of the notice.

reasonable possibility that a free and uncoerced election could be held." 633 F.2d at 1069. The court left open the issue of whether the authority exists even "when there is no reasonable possibility that the union would have attained an election majority but for the action of the employer," stating that in *United Dairy*, where the union lost the election by only two votes, "a reasonable possibility exists." *Id.* at footnote 16.

The Third Circuit acknowledged that the issue before it was "not specifically reached" by the Supreme Court in *Gissel*, 633 F.2d at 1056, and that the Court's description in *Gissel* of category 1 cases is subject to varying interpretations. 633 F.2d at 1065-66. The Third Circuit also recognized that in all post-*Gissel* cases discussing the issue the union had attained majority status and therefore "the courts have not been confronted precisely with the factual situation of this case." 633 F.2d at 1066. Consequently, the Third Circuit found it necessary to analyze the *Gissel* reasoning in detail.

According to the Third Circuit, "[t]he rationale adopted by the Supreme Court suggests that the mere absence of . . . majority support does not in itself preclude the issuance of a bargaining order by the Board." 633 F.2d at 1068. The Third Circuit regarded as more significant the fact that in *United Dairy*, as in *Gissel*, employer unfair labor practices seriously tainted the election process. "Just as a card majority could provide a better basis for testing employee preferences, so in this case may a bargaining order better further overall employee sentiment when the union has not secured a card majority and the employer has seriously undermined the validity of a union election." *Id.* Without such an order, the court concluded, "the underlying goal of the Act" of majority rule would be undermined because unions which would have prevailed in a free election would be deprived of representative status merely because of the employer's wrongful conduct. *Id.* Finally, the court emphasized that

the authority to issue a nonmajority bargaining order was necessary to deter illegal acts and considered this authority analogous to the Board's authority under *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702 (1944), and subsequent cases, to compel an employer to bargain with a union whose majority was dissipated after the commission of the unfair labor practices.

Although I recognize that this case could be appealed to the Third Circuit, I must respectfully express my disagreement with the court's decision because it conflicts with the clear terms of the statute and it misconstrues Supreme Court precedent. In analogizing the issuing of a bargaining order in the *United Dairy* case to the issuing of such an order in *Gissel*, the court overlooked a fundamental difference between the two cases. In *Gissel*, the Supreme Court emphasized that a bargaining order would serve "to re-establish the conditions as they existed before the employer's unlawful campaign." 395 U.S. at 612. This principle that Board remedies should restore the *status quo ante* is well established.[79] Unlike the situation in *Gissel*, the union in *United Dairy* never achieved majority status and thus a bargaining order would not restore the *status quo ante*.[80] Rather, the court speculated over the likelihood that the employees would have chosen the union to represent them in the absence of the employer's extensive unfair labor practices. Such speculation on the part of the court does not comport with the statutory requirement of Section 9(a) that unions in fact be "designated or selected" by a majority of employees.

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[79] E.g., *Phelps Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177, 194 (1941).

[80] The court's reliance on the *Franks Bros.* line of case law is also misplaced, as in those cases the Board's authority to issue a bargaining order is likewise derived from the principle of restoring the *status quo ante*.

It appears that the court was concerned with the far-reaching implications of the doctrine it announced. For it limited its holding to cases where there is "a reasonable possibility" that the union would have attained majority status "but for" the employer's unfair labor practices, and left open the question of whether the Board would have the authority to issue a bargaining order "when . . . no [such] reasonable possibility" exists.[31] There are two basic problems with this suggested distinction.

First, a "reasonable possibility" standard finds absolutely no support in *Gissel*. As the Third Circuit itself indicated earlier in its opinion,[32] under its interpretation of category 1 of *Gissel*, the only requirement is that the employer's unfair labor practices be so "outrageous" and "pervasive" that a fair election cannot be had. If the court's interpretation is correct,[33] then once it is shown that the employer's unfair labor practices have eliminated the possibility of holding a fair election, a bargaining order should issue, even if the union obtained cards from only one, or for that matter none, of the employees.

Second, a standard of "reasonable possibility" will not safeguard employee rights in cases such as this. In the law review article cited by the court advocating the "reasonable possibility" standard, the author suggested that the risk of imposing a union on nonconsenting employees would be minimized if the union were required "to demonstrate that a substantial proportion—say, thirty per cent—of the employees had signed membership cards prior to

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[31] In this regard, the court cited, *inter alia*, Professor Bok's article, "The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act." 78 Harv. L. Rev. 38, 138-139 (1964).

[32] 633 F.2d at 1066.

[33] I agree with former Member Penello that it is not. See part I of his separate opinion. 242 NLRB at 1039-40.

the commission of the unfair labor practices."[34] However, as former Member Penello has pointed out, the same 30-percent showing is required by the Board as a minimum before it will conduct an election, and "we know for a fact that employees vote against collective representation in more than half of all cases (43 NLRB Annual Report 266-267 (1978))."[35] Even if this figure only roughly approximates true employee sentiment in cases involving aggravated unfair labor practices and the absence of a prior showing of majority status, the sacrifice of employee free choice resulting from issuing bargaining orders under these circumstances would be monumental indeed. In short, a "reasonable possibility" standard is no substitute for the statutory requirement of majority support.

Finally, the validity of the Third Circuit's *United Dairy* decision has been called into question by the only court to discuss it to date. In *Haddon House*, *supra*, the District of Columbia Circuit, while finding it unnecessary to resolve the issue, stated as follows with regard to the Third Circuit's decision: "We do not share that court's confidence that the Board's authority is so broad. . . ." 640 F.2d at 397, footnote 7. The court continued:

> In an appropriate case this court may have to confront squarely the dilemma raised by Member Penello. This is not, however, a confrontation to be precipitated hastily, involving as it does the danger of unjustifiably imposing a bargaining representative against the will of the employees. The free choice of the employees is best determined through the inexorable logic of a secret ballot election. The Supreme Court has recognized that "the election process

[34] Bok, *supra* at 138.

[35] 242 NLRB at 1043, fn. 65.

For the fiscal year ending September 30, 1980, unions won 45.7 percent of the 8,198 conclusive representation elections the Board conducted. 45 NLRB Ann. Rep. 270 (1980).

> ha[s] acknowledged superiority in ascertaining whether a union has majority support," *Linden Lumber Division* v. *N.L.R.B.*, 419 U.S. 301, 304, 95 S.Ct. 429, 431, 42 L. Ed. 2d 465 (1974). Where employer misconduct has destroyed the possibility of a free election, the Court has approved the Board's reliance on authorization cards as "the most effective —perhaps the only—way of assuring employee choice," *Gissel*, 395 U.S. at 602, 89 S.Ct. at 1934. But for a government body to bypass the employees altogether, and impose a bargaining representative merely on the basis of its own assessment of the employees' needs, would pose a serious threat to employee freedom of choice.

I agree with that court's observations and share its concerns.

In conclusion, the decision issued by my colleagues today offends the congressional intent clearly expressed in the statute and in the legislative history that bargaining representatives are to be selected by the majority. In a larger sense, my colleagues' decision is alien to those values recognized as uniquely American. When a governmental body in Washington imposes upon its constituents a labor organization not of their own choosing, we have drifted far from this Nation's democratic ideals.

Dated, Washington, D.C. May 28, 1982

JOHN R. VAN DE WATER, Chairman
NATIONAL LABOR RELATIONS BOARD

MEMBER HUNTER, concurring in part and dissenting in part:

The question presented today is a simple one: "Should the decision on whether a particular group of employees will be represented by a collective-bargaining agent be made by this Board, or should it be made by the employees most immediately affected by that decision?" In my view, to state the question in these simple terms, devoid of rhetoric and obfuscation, is to point clearly the way to its proper answer. Because the majority, acting against precedent and logic, has reached the wrong answer and has decided that this Board can, and should, take from employees the right to settle for themselves the matter of a bargaining agent, I must dissent.

At the outset I note that I share with the Chairman a deep concern that the course which the majority has chartered for this Board is one that is proscribed by the statute itself. In this connection I commend a close reading of the opinion issued this day by Chairman Van de Water in the instant case.[36] However, the question of a clear statutory impediment to the issuance of a nonmajority bargaining order aside, I am convinced that there are important policy reasons that argue powerfully against the majority's attempt to break new ground by eschewing the principle of majority rule and issuing a bargaining order where no majority status has even been demonstrated.

In the first place, I believe that the principle of majority rule is so much a part of established Board policy and Board precedent, and looms so large in the public's understanding and acceptance of this Board's function in industrial life, that undercutting that principle by issuing a nonmajority bargaining order can serve only to diminish

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[36] See also former Member Penello's partial concurrence and partial dissent in *United Dairy Farmers Cooperative Association*, 242 NLRB 1026, 1038 (1979).

the heretofore widely held public view of the Board as an impartial agency that protects the employees' *right* to choose under Section 7 of the Act, but does not make that choice *for* employees.

Nor am I concerned only that the public perception of this Board and its proper function will be damaged. When all is said and done, it is the particular employees involved here who will have to live with the Board's selection of a bargaining representative for them. And this selection has been accomplished without benefit of an election or *any* other clear and objective manifestation that the selection of that representative reflects the wishes of a majority of the employees. Of course, at the heart of it, that is the fatal flaw in the approach endorsed by the majority. Thus, in the absence of clear evidence, they are reduced to speculating, hypothesizing, and, at bottom, guessing about the sentiment of a majority of the employees. For my part, speculation and guesswork are no substitute for objective evidence of majority status and are simply not a proper basis for imposing on employees a bargaining agent not of their choosing.

Nor or am I persuaded by the contention that had this Employer refrained from some unlawful act or combination of acts these employees surely would have registered their majority support for the Union. Given such circumstances, the argument goes, we should not "reward" the wrongdoer, here the Employer who has engaged in serious misconduct, by merely applying our usual remedies. Instead we should "vindicate" employee rights by issuing a bargaining order in favor of the putative bargaining agent who has been frustrated in its effort to achieve clear majority status. Again, such an argument turns on pure speculation. Indeed, as most observers of organizational campaigns no doubt would agree, the outcome of such campaigns is unpredictable at best, and they are subject to ebb and flow in employee sentiment that as often as not has little to do with conduct, lawful

or otherwise, engaged in by one of the parties.[37] Accordingly, where there has been misconduct by an employer but there has never been a clear showing of majority support for the union, the majority grabs the wrong end of the stick by asserting that only by imposing a bargaining order in these cases can we punish the wrongdoer and "vindicate" employee rights. If anything, such a "remedy" merely exacerbates the damage done to employees' rights by assuming the critical fact of majority status and imposing the bargaining agent on employees who might well have rejected representation *even* in the absence of any employer misconduct.

All this brings me to a less obvious but equally important consideration: What objective or indeed subjective standard or standards will the Board majority now apply in determining whether the facts of any particular case warrant application of a nonmajority bargaining order remedy? And, regardless of the standard the majority settles upon today, what is to prevent the current majority or some like-minded majority of the Board in the future from diluting those standards in cases down the road, perhaps to the point where the exceptional remedy of today becomes the commonplace remedy of tomorrow?

As to the first question, I believe that the majority itself concedes that it can devise no "bright line" test for the application of a nonmajority bargaining order remedy. Of course, there are areas of the law where standards and tests are difficult, perhaps impossible, to formulate, and where, as a consequence, the Board has found it necessary to fall back on "all the surrounding facts and circumstances" or some similar approach. I submit, however, that generally the Board has fared better in administer-

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[37] Getman, Goldberg, Herman, "Union Representation Elections: Law and Reality" (1976). See also Getman and Goldberg, "The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation," 28 Stanford L. Rev. 263 (1976).

ing the Act and effectuating its purposes when it has been able to establish and explicate clear standards and guidelines. At least in these circumstances all parties understand that conduct which violates the standards will trigger a particular finding and relief. I further submit that the Board ought not to create new areas of uncertainty and confusion over the standard to be applied and the remedy that may be granted, particularly where the remedy may itself be potentially damaging to employee interests as a nonmajority bargaining order. Moreover, if recent experience with circuit court criticism of our issuance of the usual *Gissel* bargaining order is any guide,[38] one cannot be confident that, whatever the majority *says* about its standards today, in practice those standards will not be watered down with the passage of time.

Finally, my unwillingness to join in a nonmajority bargaining order *should not be understood as insensitivity to the serious misconduct which occurred here or as a lack of concern for providing a full and effective remedy.* Thus, with one exception,[39] I join the majority's substan-

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[38] *N.L.R.B.* v. *Arrow Molded Plastics, Inc.*, 653 F.2d 280 (6th Cir. 1981); *N.L.R.B.* v. *Amber Delivery Service, Inc.*, 651 F.2d 57 (1st Cir. 1981); *Red Oaks Nursing Home, Inc.* v. *N.L.R.B.*, 633 F.2d 503 (7th Cir. 1980); *Grandee Beer Distributors, Inc.* v. *N.L.R.B.*, 630 F.2d 928 (2d Cir. 1980); *N.L.R.B.* v. *Jamaica Towing, Inc.*, 602 F.2d 1100 (2d Cir. 1979); *N.L.R.B.* v. *Western Drug*, 600 F.2d 1324 (9th Cir. 1979); *N.L.R.B.* v. *Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978); *First Lakewood Associates, limited partnership, et al.* v. *N.L.R.B.*, 582 F.2d 416 (7th Cir. 1978); *Kenworth Trucks of Philadelphia, Inc.* v. *N.L.R.B.*, 580 F.2d 55 (3d Cir. 1978).

[39] I do not agree with the majority that the Board should find that respondent unlawfully discharged striking employees by its April 20 mailgram. The Charging Party filed charges with the General Counsel alleging that the April 20 mailgram violated Sec. 8(a)(1) of the Act by threatening to discharge employees because of their involvement in protected concerted activities and that the mailgram also violated Sec. 8(a)(3) of the Act by discharging the striking employees. However,

tive findings of violations. I also join my colleagues in granting extraordinary remedies other than a bargaining

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the General Counsel issued a complaint alleging *only* that the April 20 mailgram violated Sec. 8(a)(1) by threatening employees with discharge, and the complaint was not amended at the hearing to include the allegation of an actual discharge. Consistent with the complaint allegations and the record evidence the Administrative Law Judge found, and I agree, that the mailgram unlawfully threatened the striking employees with discharge in violation of Sec. 8(a)(1) of the Act.

In their exceptions to the Administrative Law Judge's Decision, the General Counsel and the Charging Party contend that the Administrative Law Judge erred by failing to find that, in addition to threatening the strikers with discharge, the mailgram further violated the Act by unlawfully discharging the striking employees. The majority finds merit to these exceptions, and in fn. 5, *supra*, the majority contends that the discharge issue was fully litigated and that, therefore, the Board is not precluded from finding that the mailgram had unlawfully discharged the strikers.

In the circumstances of this case, where the discharge issue was initially raised in the charge but was not alleged as an unfair labor practice in the complaint, I conclude that Respondent was led to believe that the discharge issue was not before the Board. Sec. 3(d) of the Act vests the authority to issue unfair labor practice complaints with the General Counsel, and in this case the General Counsel saw fit not to allege that the mailgram had violated the Act by unlawfully discharging Respondent's striking employees. Further, it is important to note that this is not the type of case where, during the hearing, the General Counsel discovers previously unavailable evidence indicating additional unfair labor practices. Clearly, the General Counsel had long been aware of the existence of the mailgram. In my view, it is patently unfair to permit the General Counsel to raise the discharge issue at such a late stage, and after the record has been closed. Thus, we can only speculate as to how Respondent might have changed its litigation strategy or presented its facts differently if the discharge issue, with its substantial backpay liability, had been timely raised. Once the record has been closed, and, if you will, all bets called, it is too late to raise the ante and attempt to collect additional chips. Accordingly, I find that the discharge issue was not timely raised and not before the Board.

order. Indeed, I believe in the salutary effect of extraordinary remedies in cases, such as the instant one, involving flagrant and repeated violations of the statute. However, unlike the majority, I am satisfied that the extraordinary remedies which I join in granting here are sufficient to provide an adequate remedy for the wrongdoing in issue, while ensuring that the right to choose guaranteed to employees under Section 7 of the Act is not trenched upon by either this Respondent or the Board.

Dated, Washington, D.C. May 28, 1982

ROBERT P. HUNTER, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that interferes with, restrains, or coerces employees with respect to these rights. More specifically,

WE WILL NOT discharge or in any other manner discriminate against employees because of their union activities.

WE WILL NOT threaten or warn employees with discharge, loss of benefits, or other reprisals because of their union activities, membership, or support.

WE WILL NOT threaten to close the plant in order to prevent union activities among our employees.

WE WILL NOT discharge or fail or refuse to either reinstate striking employees upon their unconditional application to return to work or fail to do so in a timely fashion.

WE WILL NOT discourage membership or activities on behalf of Local 222, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, by discharging employees or discriminating against them in their hire or tenure.

WE WILL NOT coercively interrogate employees concerning their union membership, activities, or support.

WE WILL NOT solicit employee grievances and promise that such grievances will be adjusted.

WE WILL NOT promise or grant improved or additional new economic benefits or other terms or conditions of employment if they abandon their support of a union.

WE WILL NOT create among our employees the impression that their union activities are under surveillance.

WE WILL NOT threaten to never negotiate with a union should it lawfully represent our employees in order to discourage union membership, activities, or support.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Ruby Toomer, Carmen Sagardia, Jose Santiago, and all the unfair labor practice strikers listed in Appendix C immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions.

WE WILL pay Ruby Toomer, Carmen Sagardia, Jose Santiago, and all the employees and unfair labor practice strikers listed respectively in Appendixes B and C for any earnings they lost as a result of our discrimination against them, plus interest.

WE WILL send to all our employees copies of this notice; WE WILL read this notice to all our employees; and WE WILL publish copies of this notice in local newspapers.

WE WILL, upon request of the Union made within 1 year of issuance of the Board's Decision and Order, make available to the Union a list of names and addresses of all our employees currently employed.

WE WILL, immediately upon request of the Union, grant the Union and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted.

WE WILL, immediately upon request of the Union, grant the Union and its representatives reasonable access to our plant in nonwork areas during employees' nonworktime in order that the Union may present its views on unionization to employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other nonwork periods.

WE WILL, if we gather together any group of our employees on worktime at our plant and speak to them on the question of union representation, give the Union reasonable notice and give two union representatives a reasonable opportunity to be present at such speech and, on request, give one of them equal time and facilities also to speak to you on the question of union representation.

WE WILL bargain collectively, upon request with the above-named Union as the exclusive bargaining representative of all employees in the unit described

below, with respect to rates of pay, wages, hours of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, including shipping and receiving employees, warehouse employees, truck drivers and janitorial maintenance employees employed by us at our Edison plant, but excluding all office clerical employees, plant clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Our employees have the right to join Local 222, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, or to refrain from doing so.

CONAIR CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peter D. Rodino Jr. Federal Building, Room 1600, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-3652.

APPENDIX B

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Lucille Allen	October 4, 1977
Mario Arocho	October 4, 1977
Rosita Cruz	October 4, 1977
Christina De Armas	October 4, 1977
Florence L. Heimbuch	October 4, 1977
Carmen Irizzarry	October 4, 1977
Florence F. Jacko	October 4, 1977
Beulah Jones	October 4, 1977
Flora F. Kurtanick	October 4, 1977
Dorothy Lodato	October 4, 1977
Victor Maisonet	October 4, 1977
Irene Martinez	October 4, 1977
Laura Martinez	October 4, 1977
Miliady Mendez	October 4, 1977
Milagros Muniz	October 4, 1977
Luis B. Ortiz	October 4, 1977
Yillian T. Perez	October 4, 1977
Olga Rios	October 4, 1977
Ana Santiago	October 4, 1977
Carmen M. Sagardia	October 4, 1977
Rosaura Soto	October 4, 1977
Ismael Torres	October 4, 1977
Verta May Allen	October 11, 1977
Hector Caraballo	October 11, 1977
Hilda Della Torre	October 11, 1977
Margarita Gautier	October 11, 1977
Carmen Lopez	October 11, 1977
Luz M. Melendez	October 11, 1977
Hilda Perez	October 11, 1977
Alicia Rivera	October 11, 1977
Jose R. Rivera	October 11, 1977
Genovena Arocho	October 12, 1977
Olga Chalfa	October 12, 1977
Patricia Eaford	October 12, 1977

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Rosaria Machin	October 12, 1977
Rosalia Mendez	October 12, 1977
Jose Negron	October 12, 1977
Antonio Neiro	October 12, 1977
Julia Pellallera	October 12, 1977
Lilia Quiles	October 12, 1977
Awilda Rodriguez	October 12, 1977
Jose Santiago	October 12, 1977
Aida Iris Torres	October 12, 1977
Alberto Vargas	October 12, 1977
Elsie Vega	October 12, 1977
Adamina Nieves	October 14, 1977
Virginia Rivera	October 14, 1977
Rufino Saez	October 14, 1977
Portinia Soto	October 14, 1977
Rafael Valdes	October 14, 1977
Mayes Garcia	October 18, 1977
Gloria Guzman	October 18, 1977
Juan Hernandez	October 18, 1977
Roberto Mercado	October 18, 1977
Elizabeth Muniz	October 18, 1977
Wildilia Santiago	October 18, 1977
Sonia Torres	October 18, 1977
Felix Vasquez	October 18, 1977
Miguel Aquino	October 19, 1977
Celia Cruz	October 19, 1977
Celia Febles	October 19, 1977
Wilfredo Guerrero	October 19, 1977
Alice Jones	October 19, 1977
Noraima Mendez	October 19, 1977
Martha Parada	October 19, 1977
Jose Vazquez	October 19, 1977
Wilfredo Vazquez	October 19, 1977
Etta Burns	October 24, 1977
Hiriam Guzman	October 24, 1977
Carmen Sanson	October 24, 1977

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Alida Pabon	October 25, 1977
Michael Billings	November 2, 1977
Dominga Cruz	November 2, 1977
Martha Davison	November 2, 1977
Evelyn Lee	November 2, 1977
Annette Palmer	November 2, 1977
Denise Perrotte	November 2, 1977
Raymond Crespo	November 7, 1977
David Letendre	November 7, 1977
Richard Letendre	November 7, 1977
Ana Rose Fernandez	November 7, 1977

APPENDIX C

UNFAIR LABOR PRACTICE STRIKERS NOT REINSTATED

Shirley Bagby
Yvette Casquette
Lydia Gonzales
Enrique Luciano
Jose R. Mendez
Adolfo Nunez
Jose Nunez
Stephen Olah
Adrian Pagan
Gertrudes U. Rodriguez
Jesus Santiago
Ernesto Soto
Luz C. Villanueva

No. 83-1520

MAR 14 1984
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and CONAIR CORPORATION

Respondents.

SUPPLEMENT TO THE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Of Counsel:

DAVID SILBERMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

GEORGE KAUFMANN
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Washington, D.C. 20037

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Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

Attorneys for Petitioner

JD-(SF)-83-80
Edison, N.J.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

CONAIR CORPORATION

and

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Case Nos. 22-CA-7586
22-CA-7672
22-CA-7939
22-CA-8173
22-CA-8220
22-CA-8238
22-RC-7119

Robert A. Wiesen, Esq., and C. John Cicero, Esq. of Newark, New Jersey, for the General Counsel.
Herbert Burstein, Esq., and James F. Maher, Esq., of (Zelby, Burstein, Hartman & Burstein, Esqs.) of New York, New York, for the Respondent.
Melvin L. Gelade, Esq., of (Kapelsohn, Lerner, Reitman & Maisel, Esqs.) of Newark, New Jersey, for the Charging Party.

DECISION

Statement of the Case

JESSE KLEIMAN, Administrative Law Judge: Upon a charge filed in Case No. 22-CA-7586 on April 13, 1977 by Local 222, International Ladies' Garment Workers' Union, AFL-CIO, herein referred to both as Local 222 or as the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, Newark, New Jersey, duly issued a complaint and notice of hearing on May 31, 1977 against Conair Corporation, herein called the Respondent, and at times Conair, alleging that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act, as amended, herein referred to as the Act. On June 6, 1977 the Respondent, by counsel, duly filed an answer denying the material allegations in the complaint. Also on April 13, 1977, Local 222 filed a petition for certification of representative with the Board in Case No. 22-RC-7119, seeking an election among all the Respondent's production and maintenance employees, including

shipping and receiving employees, warehouse employees, truck drivers and janitorial maintenance employees, excluding all office clerical and plant clerical employees, professional employees, guards and supervisors as defined by the Act, employed at the Respondent's Edison, New Jersey plant, herein referred to collectively as the unit employees. Local 102, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 102, intervened therein. The parties executed a stipulation for certification upon consent election on April 18, 1977. 1/

On May 19, 1977, Local 222 filed a charge in Case No. 22-CA-7672 against the Respondent alleging the commission of unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. On July 5, 1977, the Respondent entered into an informal settlement agreement in Case Nos. 22-CA-7586 and 22-CA-7672 which was approved by the Acting Regional Director for Region 22 on July 12, 1977. On September 29, 1977, Local 222 filed a charge in Case No. 22-CA-7939 against the Respondent alleging violations of Section 8(a)(1) and (3) of the Act. By order dated November 11, 1977, the Acting Regional Director for Region 22 withdrew approval of the informal settlement agreement in Case Nos. 22-CA-7586 and 22-CA-7672 and set it aside for non-compliance by the Respondent, in part, of the terms of the agreement. Upon the charges filed in the above three cases, 22-CA-7586, 22-CA-7672 and 22-CA-7939, by Local 222, the General Counsel of the Board by the Acting Regional Director for Region 22 duly issued an order consolidating these cases, a first amended complaint and notice of hearing on November 11, 1977 against the Respondent, alleging that the Respondent had violated Section 8(a)(1) and (3) of the Act. The Respondent, by counsel, duly filed its answer on November 21, 1977 denying the material allegations in the first amended complaint.

An election by secret ballot was conducted on December 7, 1977 among all the Respondent's unit employees in which 69 votes were cast for Local 222, 8 votes cast for Local 102, 2/ 136 votes cast against the participating labor organizations and 41 ballots were challenged. On December 14, 1977, Local 222 filed timely objections to conduct on the part of the Respondent affecting the results of the election. The Acting Regional Director for Region 22 on December 22, 1977 issued a report on objections, order consolidating cases and notice of hearing in Case Nos. 22-CA-7586, 22-CA-7672, 22-CA-7939 and 22-RC-7119.

After Local 222 filed additional charges in Case Nos. 22-CA-8173, 22-CA-8220 and 22-CA-8238 on January 26, February 21 and February 24, 1978,

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1/ The election was initially scheduled to be conducted on May 6, 1977, but was postponed on May 5, 1977, because of the filing of unfair labor practice charges against Local 222 by the Respondent for alleged picket line misconduct in Case Nos. 22-CB-3540 and 22-CB-3603 which charges were subsequently the subject matter of a formal settlement agreement approved by the Board over the objection of the Respondent. Thereafter, upon compliance by Local 222 with the formal settlement agreement, the election was rescheduled for December 7, 1977.

2/ On December 19, 1977, Local 102, in writing, disclaimed any further interest in the representation case, Case No. 22-RC-7119.

respectively, the General Counsel of the Board by the Regional Director for Region 22, duly issued an order consolidating the above cases, 3/ a second amended complaint and notice of hearing on March 7, 1978. The Respondent, by counsel, duly filed its answer to the second amended complaint denying the material allegations therein.

A hearing in the consolidated cases was duly held before me in Newark, New Jersey commencing on March 23 and concluding on June 2, 1978. 4/ At the commencement of the hearing the Respondent moved to amend its answer to allege as an affirmative defense "the statute of limitations under the provisions of Section 10(b) of the Act." Also at the commencement of the hearing and during the course thereof the second amended complaint was amended at various times by counsel for the General Counsel to include additional allegations of violations of the Act by the Respondent which allegations the Respondent denied. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. Thereafter briefs were filed by counsel for the General Counsel, the Respondent and Local 222. 5/

At the conclusion of the General Counsel's case, the Respondent moved that "the complaint in this matter be dismissed in all respects for failure of General Counsel to state a prima facie case." I denied the motion. At the close of the hearing the Respondent renewed its motion to dismiss for failure of proof. I reserved decision thereon. Further, at the close of the hearing counsel for the General Counsel moved "that as one of the remedies in this proceeding the Federal Government be granted counsel fees for the time that has been spent by /counsel for the General Counsel, Wiesen and Cicero/ in preparing for and in conducting the litigation." Also at the close of the hearing Local 222 moved that it be granted as part of any remedy herein "reasonable attorney's fees both for the preparation and litigation of this case . . . and counsel fees for the investigation portion of the unfair labor practice case . . . and that the Union be reimbursed for its organizational expenses incurred by virtue of Respondent's bad faith in unfair labor practices." I reserved decision on both these motions. The above motions by the respective parties were raised and reiterated again in their briefs submitted herein. For reasons hereinafter set forth I deny the

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3/ Case Nos. 22-CA-7586, 22-CA-7672, 22-CA-7939, 22-CA-8173, 22-CA-8220, 22-CA-8238 and 22 RC-7119.

4/ The hearing comprised some 38 days of trial with a transcript of 9,521 pages and a substantial number of diversified exhibits, i.e., video tapes, photographs, posters, correspondence, employment records, personnel manuals and other documents.

5/ Because of the complexity of the issues involved and the lengthy transcript and numerous exhibits comprising the extensive record herein, I permitted the Respondent to file a reply brief on November 20, 1978, over the objections of both counsel for the General Counsel, and counsel for Local 222. By motion dated November 28, 1978, counsel for General Counsel moved to strike the Respondent's reply brief. While this motion has some merit in part, I will, nevertheless, deny it and consider the Respondent's reply brief along with the entire record and the briefs filed herein in deciding the issues presented in this proceeding.

Respondent's motion to dismiss in its entirety and grant the above motions made by General Counsel and Local 222, only in part as to remedy as hereinafter set forth.

Upon the entire record and the briefs of the parties, and upon my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. The Business of the Respondent

The Respondent, at all times material herein, has been a corporation organized under and existing by virtue of the laws of the State of Delaware, maintaining its principal office and place of business at 11 Executive Avenue, Edison, New Jersey, herein called, at times, the Edison plant, where it is, and has been continuously, engaged in the manufacture, sale and distribution of hair care, personal grooming, and related products. The Respondent also maintains a warehouse and distribution facility, and chemical laboratory in Phoenix, Arizona and owns, by means of joint venture, a one-third interest in Continental Electric Industries, a corporation with facilities in Hong Kong which produces "hair blowers" and hair "curling irons." 6/ However the Edison plant is the only facility involved in this proceeding. In the course and conduct of the Respondent's business operations during the preceding 12 months, these operations being representative of the operations at all times material herein, the Respondent caused to be manufactured, sold, shipped and transported from its Edison plant products valued in excess of $50,000 from its place of business in interstate commerce directly to states of the United States other than the State of New Jersey. The second amended complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Further, at all the times material herein, Leandro Rizzuto, also referred to herein as "Lee" Rizzuto, was, and continued to be the Respondent's president; John Mayorek and Jerry Kampel, 7/ vice presidents; Irving Green, director of materials; William Reed, inventory control manager; Joseph Marane, Les Price, Ann Gere and Rosa Cruz, supervisors; and Arthur Marin, the Respondent's personnel director. The second amended complaint alleges, the Respondent admits and I find that the above named persons are supervisors within the meaning of Section 2(11) of the Act, and have been and are now agents of the Respondent acting on its behalf. The second amended complaint also alleges that Naomi Rodriguez and Nancy Rodriguez are also supervisors within the meaning of Section 2(11) of the Act and have been and are now agents of the Respondent

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6/ At the time of the hearing the Respondent was purchasing the entire production output of this Hong Kong facility.

7/ It should be noted that the record often makes reference to a "Jerry Campbell" both as a witness himself and in the testimony of other witnesses herein. It is obvious from the record that "Jerry Campbell" and Jerry Kampel are one and the same, with "Campbell" in reality being a misspelling of his surname by the typist through inadvertence or mistake.

acting on its behalf. Additionally the second amended complaint alleges that George Zadroga, employed by the Respondent as a quality control inspector, at all the times material herein has been and is now an agent of the Respondent within the meaning of Section 2(13) of the Act, acting on its behalf. The Respondent denies the above. However, the evidence herein supports the conclusion that both Naomi Rodriguez 8/ and Nancy Rodriguez 9/ are supervisors within the meaning of Section 2(11) of the Act and that they, under Section 2(11) of the Act, and George Zadroga 10/ under Section 2(13) of the Act, have been and are now agents of the Respondent acting on its behalf.

8/ Concerning Naomi Rodriguez, both Irwin Rosen, employed by the Respondent as a cost accountant, and Georgina Echevarria, an assembly line employee, called as witnesses for the Respondent, and Rosario Machin and Florence Jacko, the General Counsel's witnesses, all testified respectively that Naomi Rodriguez was a supervisor with duties and authority similar to that of Rosa Cruz, an acknowledged supervisor, and that Rodriguez directed and controlled the assembly line that Machin, Echevarria and Jacko worked on. Further John Mayorek, the Respondent's vice president in charge of administration, in a list supplied by him to the General Counsel specifying the names of employees occupying the position of production supervisor and/or group leader as of April 9, 1977, listed Naomi Rodriguez as a supervisor. Mayorek also confirmed that she was a supervisor in his testimony given at the hearing. Additionally Matilda Morales, another of the Respondent's witnesses, testified that Rodriguez was her "forelady" and directed the work of the "more than 30" employees on her production line.

9/ With regard to Nancy Rodriguez, Lucille Allen, Noraima Mendez, and Florence Jacko, assembly line employees, testified that Rodriguez was a supervisor before the strike commenced on April 11, 1977. Alfredo Tavera, an assembly line employee called by the Respondent as its witness testified that Nancy Rodriguez was his "foreman" and "floorlady." While he at first testified that, "She gives orders and sometimes she also helps . . . on the line" he later denied that she gave orders. However his testimony was fraught with contradictory statements and seemed designed to assist the Respondent in establishing its denial of the unfair labor practices alleged herein. Further, John Raab, a vice president, testified that Nancy Rodriguez held a similar position to Rosa Cruz's, admittedly a supervisor, and that both were responsible for maintaining the flow of work and instructing employees in the performance of their duties. However Raab denied that she was a supervisor, but it is obvious from his testimony that he based this upon Rodriguez' not having the right to directly hire and fire employees. While the Board has found that the right to hire and fire is a significant indicia of supervisory status it is not the only one upon which such a finding can be based nor is the lack of such authority by an employee exclusory to an affirmative finding thereof.

10/ With regard to Zadroga, the reasons for this determination and the evidence upon which it is based are better suited for consideration in another part of this decision and this will be set forth hereinafter.

II. The Labor Organization Involved

The second amended complaint alleges, the Respondent admits, and I find that Local 222, International Ladies' Garment Workers' Union, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The second amended complaint alleges, in substance, that the Respondent violated Section 8(a)(1) and (3) of the Act by soliciting grievances from its employees and indicating that such grievances would be adjusted; by interrogating its employees concerning their membership in, activities on behalf of, and sympathy in the Union; by promising and granting benefits to its employees; by threatening its employees that existing benefits would be taken away, that its Edison plant would be closed and its operations moved to Hong Kong, and that employees would lose their employment; by creating among its employees the impression that their activities on behalf of the Union or any other labor organization were being kept under surveillance; by failing and refusing to reinstate various employees who had engaged in a strike; by discharging various employees and failing and refusing to reinstate them; by requiring certain employees to "execute statements of their intention to return to work," and to complete and submit new employment applications "as a condition to their reinstatement;" and by classifying all these employees "as either former or new employees," all because they joined or assisted the Union and engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or in order to discourage employees from supporting the Union or any other labor organization, and further by violating certain of the terms of an informal settlement agreement between the parties herein. The Respondent denies these allegations.

A. Background

The Respondent, Conair Corporation, was organized in 1959, 11/ originally having its place of business in Brooklyn, New York wherein it imported sundry hair care products from Hong Kong and resold and distributed these items in the United States. In or about 1968 the Respondent expanded its business to include the sale of electrical hair care products, i.e., hair blowers, hair curling irons, etc. In 1972, a joint venture was entered into between the Respondent, under its former name of Continental Hair Products, Inc., and Continental Electric Industries, Ltd., a Hong Kong corporation which produces hair blowers, curling irons and various other appliances, with the Respondent purchasing for resale and distribution in the United States the products manufactured at the Hong Kong plant. 12/

11/ The Respondent was then incorporated under the name, Continental Hair Products, Inc. In July, 1976 the Respondent changed its name to Conair Corporation.

12/ The Respondent had acquired a one-third interest in this joint venture.

As its volume of sales increased the Respondent found its Brooklyn facility too limited to handle the vastly expanding business and in July or August 1974, it acquired a new building site in Edison, New Jersey not only for its administrative and distribution activities but also, because of a substantial increase in the cost of production of hair blowers imported from the Hong Kong facility, for its own manufacturing capabilities. After the completion of the plant in late December 1974 or January 1975, the warehousing and administrative operations of Conair were transferred to the Edison plant. However during 1975, the Respondent continued to import from Hong Kong electrical items it sold in the United States.

The Respondent commenced domestic manufacture of electrical hair care products in 1976, although approximately 65 percent of the items sold by it in that year were manufactured in and imported from Hong Kong. However in 1977 the percentages changed and the Respondent was now manufacturing in its Edison, New Jersey plant, 65 percent of the electrical products sold by it and importing only 35 percent from Hong Kong. John Mayorek, the Respondent's administrative vice president and its chief witness at the hearing testified that the trend toward manufacturing at its Edison plant the electrical products sold by it continued into 1978, decreasing the Company's dependence upon products produced in Hong Kong. Mayorek stated that the Hong Kong facility in 1976 and 1977 had been operating at peak productive capacity and had no room for expansion either in physical space or number of employees so that consideration of any sizeable increase by the Respondent in the production of its electrical hair care products had to be centered at the Edison plant with its potential for expanded facilites. 13/ Mayorek continued that planning had been underway in 1976 and 1977 by the Respondent to expand its manufacturing and production capabilities with additional facilities to be built on an unimproved land site it had acquired in the industrial park. According to the testimony herein, at the time of the hearing the Respondent employed "approximately 350-380 production people and there were approximately 275 people in the rest of the company."

B. The Evidence

The Union commenced its campaign to organize the Respondent's unit employees at the Edison, New Jersey plant in March 1977. Jerry Rivera, assistant manager of Local 222, testified that union authorization cards were distributed

13/ The Edison, New Jersey plant is located in an industrial park and consists of a two-story building with 116,000 square feet of space on a 10-acre site. The building or plant is divided into three sections: approximately 60,000 square feet for warehousing (storage of finished and unfinished products and packaging and shipping of materials); approximately 40,000 square feet for production and manufacturing (seven or eight assembly lines, etc.); and approximately 16,000 square feet for administrative functions (executive, accounting and sales offices.)

to employees in "front of the shop," at the Union's "hall in Perth Amboy" and at a bank in the vicinity of the Conair plant. 14/

John Mayorek, testified that the Respondent first became aware of Local 222's organizational efforts in the latter part of March or early April 1977, when he observed Rivera and other persons placing union leaflets and other materials on cars parked in the Respondent's parking lot at which time, after leaving his office and going outside, he told Rivera to continue these activities "on the street" adjacent to the plant and not in the parking lot. The evidence herein indicates that from March 30 through April 10, 1977, the Union secured approximately 66 signed authorization cards from the Respondent's employees, another 58 signed authorization cards on April 11, 1977, the day the strike commenced, and 14 additional cards thereafter. 15/

The Meeting of April 4, 1977

On the morning of April 4, 1977 the Respondent held a meeting of all its unit employees in the Conair plant cafeteria. Stephen Olah, who was employed by the Respondent in its service and warehouse department at the time the events discussed herein took place, 16/ testified that the meeting occurred between 10:00 and 10:35 a.m. with approximately 200 employees in attendance. Olah stated that Mayorek and Jerry Kampel, another of the Respondent's vice presidents, were present representing the Respondent at this meeting. Olah continued that Mayorek addressed the gathered employees and told them that he had heard that the employees were trying to start a union and that "with a union we would be separated from management." He related that Mayorek,

> . . . pointed out what the Company had done for us; they had enlarged the cafeteria, majority of the food in the vending machines were paid for . . . they had put in air conditioning, they had given us two more holidays, and I think he also said sick days. He pointed out a profit-sharing plan that was available to only nonunion members, . . . then he went on to say what the Company was going to do for us in the future.

14/ According to Rivera, he, Hugh Harris, district manager of Local 222, and union organizers, Joseph O'Keefe, Olga Morales, Sergio Santana, Raphael Burgess, and Caesar Rivera Monges, participated in the organizational campaign. He stated that he also gave several of the Respondent's employees Ernesto Soto, Julia Pellallera, Jose Santiago and "Jesus something," being among those whose names he remembered, authorization cards to distribute to their fellow employees.

15/ Between April 12 and April 18, 1977, Local 222 secured 12 signed authorization cards from the Respondent's employees, at least 7 of which were from striking employees. Two additional cards were signed in late April or early May 1977 by employees who were on sick leave prior to April 13, 1977 and who subsequently joined the strike.

16/ At the time he testified in this proceeding Olah was no longer employed by the Respondent but instead was an employee of Local 222. However, while an employee of the Respondent Olah signed a Union authorization card on April 5, 1977.

They were going to put in new water fountain in the back of the factory so that ladies wouldn't have to walk all the way up to the front. He said that they were going to present a wage package deal to us, that they're going to hire someone specifically to deal with our problems. [17]

According to Olah, Mayorek additionally told the employees that if they had any problems they could go to their supervisor with it or to any of the Respondent's vice presidents or "to the president of the firm;" that the Union's health insurance plan would be inferior to the one already enjoyed by the Respondent's employees; and that the Respondent intended to enlarge the cafeteria and "put hot food in." 18/ Olah added that no one from management had ever spoken to him about any of the above nor had ever asked him if he had any problems prior to this meeting.

Olah also testified that Kampel also spoke to the employees at this meeting similarly telling them about the new benefits the Respondent proposed to grant them and upon one occasion during the meeting when an employee related a concern he had in response to Mayorek's request for the employees to air their problems, Kampel screamed at the employee who had asked about wages, admonishing him for not previously having spoken to his supervisor about it stating, "How do you expect management to know about it if you don't tell them your problems?" 19/

The General Counsel proffered five additional witnesses who were employed by the Respondent at the time, were present at the April 4, 1977 meeting, and who testified as to what occurred therein. 20/ Their testimony was substantially similar to that given by Olah.

Florence Jacko, an assembly line employee, testified that "on the morning of April 4th, 1977, Rosa Cruz, our line supervisor, came up to us and told us that there would be a meeting in the cafeteria and we must all attend." She stated that the meeting was held "about 10:00, 10:30, and the room was kin

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17/ The evidence herein discloses that subsequently the Respondent installed a new water fountain in its plant and hired a bilingual personnel director, Arthur Marin, on June 1, 1977.

18/ The evidence herein shows that in April 1977, the Respondent's cafeteria food service consisted of vending machines only. Sometime in November 1977, the cafeteria was enlarged by the Respondent to provide hot and cold food counter service for its employees.

19/ Since a great many of the Respondent's employees working on the assembly line speak Spanish fluently but have some difficulty in understanding or speaking English, an interpreter was used at this meeeting to translate both Mayorek's and Kampel's remarks from English to Spanish in order to facilitate the employees' understanding and awareness of what they were saying.

20/ Florence Jacko, Noraima Mendez, Carlos Cruz, Lucille Allen and Maria Lopez. Jacko, Mendez, Allen and Lopez were still employed by the Respondent at the time they testified herein. Further Jacko, Mendez, Cruz, and Allen had all signed authorization cards for Local 222.

of crowded." She related that Mayorek addressed the employees through an interpreter and said that the Respondent would "rather work without a union because the people would be separated from management if there were a union . . . ," and that the employees should take advantage of Respondent's "open-door policy" which enables the employees to speak to Mayorek, Kampel, or even "see" Rizzuto, the Respondent's president if they had any problems. She continued that Mayorek mentioned current employee benefits and indicated that "they would do their best to make it better for the employees, and they would later on, when they were able to, they would offer a wage deal and other benefits." Jacko added that Mayorek also mentioned

> Something about a water fountain, and also hot and cold foods in the cafeteria, . . . a profit sharing plan, but, if a union came in, that would no longer be available to anybody that belonged to the union . . . , there was something about the guard, the attitude of the guard, and that would also be corrected.

Jacko maintained that prior to this meeting she had never heard of "this open-door policy" nor had she ever attended any meetings like this one at Conair before. 21/

21/ During Jacko's testimony, the Respondent raised an objection thereto and moved "to strike all testimony of any events up to and including July 5, 1977" on the ground that "an informal settlement agreement was entered into between the Acting Regional Director /for Region 22/ and the Respondent. . . . While it is true that at some subsequent date this was disaffirmed, the fact is that all of the complaints and charges had been deemed settled, and satisfactorily settled by the Regional Director. And there's no authority to reopen these events at this time." I overruled the objection and did not rule on the motion at that time. I herewith deny this motion.

In Thermo Electric Co., Inc., 222 NLRB 358, 370 (1976), the Board stated:

> Long ago the Supreme Court recognized that, because of the flexibility of administrative practice and the desirability of encouraging settlements to accomplish the purpose of the Act, such common law concepts as merger and estoppel by settlement were inapplicable to Board settlements, so the Court permitted the Board to litigate to final order matters which were the subject of an agreement which was set aside because of post settlement violations. Wallace Corporation v. N.L.R.B., 323 U.S. 248 (1944). Following this precedent, the Board has consistently and recently held that the commission of post settlement unfair labor practices authorizes the Regional Director to set aside the earlier agreement and seek a remedial order directed both to presettlement and to post settlement misconduct. Aurora and East Denver Trash Disposal, 218 NLRB No. 4 (1975); Dynacor Plastics and Textiles Division of Medline Industries, Inc., 218 NLRB No. 216 (1975).

Noraima Mendez, an assembly line employee, testified that Mayorek had stated at the April 4, 1977 meeting:

> Well, I guess you know what this all about it. I understand they try to get a union, I don't see why. I don't think they have any reason. I told you you never need a union over here. And then right away he started talk about the benefits we got in the past, like air condition, the cafeteria was enlarged, and the vending machine. He started to talk also about the insurance benefits. In fact, he said by that time I don't see why they asking for union because you have hospitalization, you have insurance, and I don't think the union going to bring any better. . . .And he say, we try to do our best, but without the union. . . . And he started talking about again the cafeteria going to be hot food in the future, and the company going to pay part of it so they are going to be cheaper for all the employees.

According to Mendez, Mayorek promised that the Respondent would provide an additional water fountain in the plant and hire a bilingual employee to assist Spanish speaking employees in resolving any problems they have. She added that both Mayorek and Kampel stated that employees could discuss their problems with "anybody be in charge," including themselves and "Lee" Rizzuto, the Respondent's president. Mendez stated that this was the first time she had ever heard mention about an "open-door policy" and in fact, "I don't even know these people before, like Mr. Rizzuto and . . . Jerry Kampel and John Mayorek, I never see before, you know--I never talk before." She recalled that Mayorek also spoke about the Respondent's profit-sharing plan which she was unfamiliar with and "so far I understand he said that is only for the people that no member to any union at all."

Mendez further testified that on April 4, 1977 after lunch, while working on the assembly line across from Rosa Cruz's sister, Cruz being her line supervisor at the time, she was told by Rosa Cruz,

> . . . they tried to get a union inside, but listen, I don't think you people going to get union over here. I think you better forget about it. They are not going to be any union over here. She said, well, the president, he don't want the union over here. He don't need that union over here, and that's it. . . . He have a lot of money and he can do anything he wants. . . . The best thing for you people forget about the union. And they are going to solve your problems. . . . Well, like she says, he was so sure if the union came in he close the plant.

Mendez continued, "Rose Cruz, she is a supervisor, and she told me if any union get in, Mr. Rizzuto, he have a lot of money, he don't need that headaches, and he be glad to shut the plant off and go to Hong Kong with better place and a low cost." She added that later that day, April 4, 1977, or the next, April 5, 1977, Cruz told her that she had just attended a management meeting and "I got a lot of problems. She say, I got too much headache. She said, well, for sure, Mr. Rizzuto, he don't need the headache, and he say he not going to negotiate with any union--not this union--any union." Mendez stated that Cruz also told her that one of the Respondent's vice presidents had instructed Cruz to tell any employee dissatisified with "what they are making" to "go to Hong Kong and get it

there." Albeit Rosa Cruz denied having any conversations with employees involving Local 222 or about the Edison plant closing and moving to Hong Kong, she did testify that there were rumors being circulated among the employees that the Edison plant would be closed and the Respondent's production operations moved to Hong Kong if a union came in. At first Cruz testified that this rumor had been in effect among the employees in the 2 or 3 weeks before the election. However during cross-examination she stated that she first heard these rumors on "April 12th, April 15th, a couple of people was talking inside," employees whom she could not identify, then later admitted that she had heard these rumors in the women's bathroom and plant cafeteria before the strike started on April 11, 1977. 22/

Carlos Cruz, 23/ employed by Respondent as a material handler at the time theseevents took place, testified that he was informed by his supervisor Ann

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22/ Concerning Cruz' credibility as a witness it should be noted that Cruz was the only Spanish speaking supervisor employed by the Respondent at the time and it was obvious from the tenor of her testimony that she feels a great deal of loyalty to the Respondent and would not wish to cause the Respondent any harm legally or financially and therefore geared her testimony accordingly. In contrast thereto Cruz admitted that she harbored a deep hatred for Local 222. Further, Rosa Cruz's testimony is incredible in part, for example she denied ever having heard the subject of the Union or the Board's election being discussed at the plant by anyone, when the evidence clearly shows it was a topic constantly kept within the attention of the employees by means of meetings held by the Respondent, the strike activity then in progress and the subsequent meetings and electioneering by both the Respondent and the Union prior to the representation election.

23/ At the commencement of the hearing the Respondent moved for sequestration of all non-discriminatee witnesses which I granted. Carlos Cruz testified on March 24, 1978 and during cross-examination acknowledged that he had been present in the hearing room on the previous day, March 23, 1978, listening to the testimony of General Counsel's witnesses, Stephen Olah and Florence Jacko, who had testified that previous day. The Respondent moved "to strike" all his testimony. I reserved decision on the motion. It should be noted that Cruz, while a participant in the strike which took place on April 11, 1977, involving the Respondent's employees, which will be discussed more fully hereinafter, never sought reinstatement at the conclusion of the strike due to his decision to enroll as a full-time student in a local college, and therefore he was not listed as a discriminatee in the second amended complaint. Cruz testified on recall as a witness that he had not left the hearing room on March 23, 1977 after the motion for sequestration was granted because he did not understand the sequestration order; that no one told him to leave the hearing room; that at the time this occurred, he was sitting with other witnesses for the General Counsel, Olah, Jacko, Mendez and Lucille Allen, none of whom had left the hearing room and although they were in fact excepted from the sequestration order as discriminatees, he was unaware of this technicality nor understood it and therefore did not know that he had to leave the hearing room or otherwise he would be violating the sequestration order. Cruz also testified that if he had realized his mistake he would have left the hearing room. In view of

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Gere on April 4, 1977, to attend a meeting of all employees in the cafeteria which he did. Cruz stated that Mayorek addressed the employees at this meeting and said:

> Conair does not want a union coming in there. He was stating all the benefits that they had right now, the holidays. And if the union came inside here, that we will have no more Christmas parties, no more turkeys, and right now they were planning a cafeteria built for warm meals and they were going to clean up the bathrooms and put a new water fountain in. . . . He said . . . that if the union came in we were not eligible for profit-sharing. It was only for non-union members. . . . He was saying that you have any problems--like my door is always open or Lee Rizzuto's door is always open, come in with your problems and we will try to solve it for you. . . . go to your supervisor. If that doesn't work come see me.

Cruz continued that this was the first time he had heard that employees could bring their problems directly to Rizzuto, Mayorek or Kampel. Cruz added that at the beginning of the meeting, Mayorek had apologized to the employees for Rizzuto's absence at the meeting since Rizzuto was in Hong Kong at the time for "business purposes."

Cruz related that previously, on Saturday, April 2, 1977 while he was working overtime, Ann Gere approached him and asked if he had signed a "union card." When Cruz denied having done so Gere asked, "Do you know anybody else that signed a union card. I go no. And then she tells me, do you know about the meeting down at Club 81, down Perth Amboy? I said yes, I heard about it. But I did not attend any of the meetings there."24/ He also testified that on April 5, 1977, Gere again asked him whether or not he had signed an authorization card and when he denied doing so she stated, "Somebody told me you signed--that you signed a card and you better watch out." According to Cruz, about 2 hours later, "Ann /Gere/ comes up and goes, all those people that signed cards are looking for is for the plant to close down." 25/

23/ this I denied the Respondent's motion to strike Cruz' testimony. While Cruz technically violated the sequestration order and admitted discussing this matter with other witnesses I find nothing in his testimony which would lead me to discredit or disbelieve it. His testimony is consistent with that given by all the other witnesses for the General Counsel other than the two witnesses whose testimony he overheard and more particularly, consistent with what I believe the record as a whole establishes as fact concerning the events at issue herein. I believe Cruz' action in remaining in the hearing room while other witnesses testified was due to his not fully comprehending what was occurring, was actually inadvertent and not deliberate, and does not warrant the striking of his testimony as a whole.

24/ According to the testimony of Cruz and other witnesses, Club 81 is a, "club, they usually held dances there in Perth Amboy. And the union at the time was using that to hold meetings."

25/ While Cruz testified that another employee "was close" by during this occurrence he also indicated that the employee, Rosaria Machin, was approximately 10 feet away and there was noise from the production line. Machin although called as a witness by the General Counsel did not testify concerning this conversation.

Ann Gere, in her testimony not only denied these conversations with Cruz, but denied having spoken to any employees about Local 222 or about Hong Kong. However on cross-examination she testified "when you speak about the union, you mean what was going on? Sure we all talked in general what was going on," and then Gere admitted speaking to a "great number of employees about the union." Gere, by the way, is the chief assembly line supervisor.

Lucille Allen, employed by the Respondent as an assembly line worker testified that on April 4, 1977 at about 10:30 that morning Ann Gere, her production line supervisor, "came over to the line and shut it down and told us that there was a meeting in the cafeteria. We went to the cafeteria and there was a lot of people, and John Mayorek, Bob Gagas, Jerry /Kampel/, John Raab and about two hundred employees were there." Allen continued that Mayorek addressed the employees stating,

> He said that Conair did not want a union, and he told us of the things we had. They had added two more sick days and we had air conditioning. And the present health insurance we had was good, and if the union came in, they would offer Blue Cross and Blue Shield and our plan was better. And that profit-sharing plan wouldn't be available to union members, and that a water fountain would be installed so the women wouldn't have so far to walk, and . . . they were going to enlarge the cafeteria and they were going to have hot and cold meals, and that they would have a person to listen to our problems and . . . that Conair always had an open-door policy, and if we had any problems, we should have gone to management.

Allen added that Mayorek told the employees that they could have taken their problems to either Kampel or himself, or even Rizzuto. Allen stated that she had never been told previously that Conair had an "open-door policy" nor had anyone in management ever asked her about her problems or complaints on the job, nor had she ever attended a meeting such as this one before.

Allen related that the following day, April 5, 1977, she observed Mayorek walking down the assembly line aisles with a pad and pencil, speaking to employees and writing on the pad he carried but she could not hear what was said. Mendez also testified that subsequent to this meeting she had seen Mayorek with an interpreter, walking by the assembly line carrying a pad and pencil and speaking to employees, "I guess about what kinds of problems they have." 26/

Maria Lopez, 27/ employed by the Respondent in its repair department, testified that she attended a morning meeting held in the cafeteria "in the

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26/ Mayorek testified that he "frequentlly patrolled the plant with writing materials in his hands . . . for different reasons," and admitted doing so in the production area during the week of April 4, 1977.

27/ Maria Lopez did not sign a union authorization card, did not participate in the subsequent strike involving the Respondent's employees which began on April 11, 1977, did not attend any of the union meetings and expressed, in her testimony, her non-support of Local 222, as contrasted to the obviously pro-union attitudes of Olah, Jacko, Mendez, Cruz and Allen.

beginning of April 1977" wherein Mayorek and Kampel spoke to the employees present. Lopez stated that Mayorek told them:

> They say that the employees were going to get a raise, and they'd make everything more comfortable, that they had put on air conditioning and they would enlarge the cafeteria, they put drinking fountains. . . . It was said that if workers had any problem, they could go to Mr. John Mayorek or go to the foremen or to any superiors that if they could, they'd solve all the problems. . . . They say that the union could not give us the benefits that the company was giving us.

Lopez added that she had never before attended any meetings at which management representatives were present. /28/

While the testimony of the above witnesses clearly indicates that Mayorek was the principal speaker at the April 4, 1977 meeting and did most of the talking, both Olah and Mendez testified that Kampel also spoke at the meeting about employee benefits then in existence and reiterated Mayorek's remarks that the employees could bring their problems and grievances to their supervisors and if not satisfied then up the line to Mayorek, Kampel or Rizzuto. 29/

John Mayorek, 30/ the Respondent's vice president for administration, testified that the first time he addressed a meeting of the Respondent's employees concerning Local 222 occurred on April 6, 1977 during the afternoon of

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28/ Lopez testified through an interpreter and stated during her testimony, "I am nervous, I forget a lot of things."

29/ Interestingly, during the cross-examination of General Counsel's witnesses, Mendez and Cruz, counsel for the Respondent asked them if they were aware that a tape recording had been made of the meeting held on April 4, 1977 to which they had testified during their direct examination. Mendez and Cruz denied any knowledge concerning this and stated that their testimony would be the same as to this meeting even though a tape recording thereof did exist. This also occurred when they were testifying about additional meetings held by the Respondent with its employees during the week of April 4, 1977 as hereinafter set forth to which they responded similarly. Counsel for the Respondent indicated that he was advised by Mayorek that there actually were tape recordings in existence of the April 1977 meetings and it was his intent subsequently to offer them into evidence after laying a proper foundation. Thereafter, during the hearing, Mayorek testified that he did not have a tape recording of the April 4, 1977 meeting and did not know whether a tape was made of the second mass employee meeting held that week. The Respondent offered no further explanation of the above.

30/ Mayorek was called initially as a witness by the General Counsel and examined as a hostile witness under Section 611(c) of the Federal Rules of Evidence and Rule 43(B) of the Federal Rules of Civil Procedure.

that day in the plant cafeteria. 31/ He stated that additionally present for management at this meeting were Kampel, who also spoke at the meeting, John Raab, 32/ another of the Respondent's vice presidents and some other supervisors. Mayorek related that he was assisted by an interpreter and in aid of his remarks to the employees used a set of notes and a letter or notice, dated April 5, 1977, 33/ which the Respondent had mailed to all its employees . Mayorek continued that he had called this meeting of the Respondent's employees because he had been advised that there were "many questions from the people about different activities," and that "We had been asked by many of the people that there were, you know, grievances that they had that were not answered."

Mayorek testified that at the beginning of the meeting he told the employees, "in substance," that he was speaking for Rizzuto, the Respondent's president, 34/ and that the Respondent did not want nor need a union at Conair. He stated that he listed the benefits currently in effect for the Respondent's employees and explained the Respondent's profit sharing plan to the gathered employees telling them it was for nonunion employees only. 35/ Mayorek continued that he told the employees that the Respondent was "looking for a bi-lingual personnel manager who could listen to and help the employees with

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31/ Mayorek testified that all the Respondent's employees in the production, maintenance, service and warehouse departments attended this meeting. The evidence shows that of approximately 200 production and maintenance employees employed by the Respondent at the time, between 75-85 percent (130-150 employees) were Spanish speaking.

32/ While Raab testified herein as a witness for the Respondent he was not asked about what occurred at this meeting.

33/ English and Spanish versions of this letter or notice were mailed to its employees by the Respondent and indicated therein that this was, "in response to many of your grievances and problems," stating, among other things, that "Conair always maintained an 'Open Door' policy with respect to all employees," and listing among other benefits, "Profit Sharing Plan for non-union members."

34/ In his notes for the meeting Mayorek listed an item "apologize no meeting." When counsel for General Counsel suggested that this meant that Mayorek was "apologizing to the employees for not holding a meeting before, not communicating with them effectively before?" he replied, "I don't know that to be a fact." He also stated as to its meaning, "Other than the fact that maybe Mr. Rizzuto couldn't make it for that meeting. That's the only thing I can think of."

35/ While Mayorek alleged in his testmony that this statement was made to the employees because it is one of the profit sharing plan's eligibility requirements, he also acknowledged that employees signing Union authorization cards, attending union meetings or otherwise supporting a union are not thereby disqualified from participation in the profit sharing plan.

their problems," 36/ and that the Respondent had an "open door policy" whereby employees could bring their problems and complaints to "Conair managers" including himself and Rizzuto. He related that he additionally told the employees that the Respondent would "look into" the question of higher wages and the necessity for an additional water cooler, and he "conveyed" to the employees that Conair "can do more for you than the union." Mayorek added that he told the employees about the disadvantages of a union including dues payments, initiation fees, the possibility of loss of income due to "strikes and other things," and that there could be fines and assessments imposed by the union.

While Mayorek admitted the possibility that things were said at this meeting which he could not recall, he categorically denied promising employees any benefits to obtain their withdrawal from and disavowal of the Union or threatening them with discharge or disciplinary action because of their activities on behalf of Local 222. He testified that he told the employees that they didn't need a union but if they desired union representation "there was nothing the company could do about it." However later in his testimony he admitted to being unsure about his having said the latter at this particular meeting. Additionally Mayorek was positive that he spoke about the Respondent's "grievance committee" since he wanted to make sure that the employees knew about it. "If they weren't aware of it they knew there was a source that they could put a grievance in or talk to someone about it, I wanted to make sure that they were aware of it." 37/ Mayorek continued that Kampel also spoke at this meeting reiterating briefly what he had previously said to the employees but particularly concerning the Respondent's "open door" policy, and that the Respondent "really

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36/ As stated before the evidence herein shows that the Respondent hired Arthur Marin on June 1, 1977, as its personnel director to handle employee complaints and grievances, "along with other things," with Marin being fluent in both the English and Spanish languages.

37/ Mayorek, in an affidavit previously given to a Board agent during the investigative stage of this proceeding, stated "I did not make any remarks to the employees that are not contained in the three page outline/letter dated April 5, 1977." However it should be noted that this outline/letter contains no reference to any "grievance committee" although it does state, "Conair always maintained an 'open door' policy with respect to all employees. The Union concept of a grievance procedure, or being represented, is taking a step backward. They will have someone represent you instead of you representing yourself. On several occasions we have expressed that if an individual or a group of people had a specific problem that he or she was welcome to discuss it with management at any time." Moreover Mayorek failed to mention anything about a grievance committee in his affidavit at all. It should also be noted that the Respondent's personnel manual, distributed to all its employees, does not mention a grievance committee nor for that matter anything about an "open door policy."

didn't need a union," because of what the Respondent had done for its employees in the past. 38/

Four additional witnesses testified for the Respondent concerning the April 4, 1977 meeting. Josephine Torres, a solderer on the assembly line testified that she attended a meeting prior to the strike on April 11, 1977 at which Mayorek, Kampel and Raab were present. She recalled that it was held between 2:30 and 3:00 in the afternoon in "one of the offices" but not in the cafeteria and "I can't remember exactly what they say. There was explain to us, you know, how things going to be in Conair, you know, how--but exactly I can not remember everything, you know."

Lucille Barsi, employed by the Respondent on the assembly line, 39/ testified that on April 6, 1977 she was directed to attend a meeting of employees in the cafeteria. 40/ Her recollection of what was said at this meeting was limited. She stated, "Well, the only thing I remember is that there was--I believe Jerry, /Kampel/ he was just talking about the benefits, in other words, just telling the people what the benefits were of the company, and I guess he just like asked if there was any questions. I really can't remember more or less anything else. I mean, he went into the benefits that we had and all, and that's all I really remember." She added that Mayorek and Kampel had mentioned that the Respondent had an "open-door" policy.

38/ In an affidavit given to a Board agent Kampel denied making any statements or even speaking at this meeting. Further, at the hearing while Kampel testified that he could not remember what Mayorek or for that matter what anyone else said at this meeting, he did admit on cross-examination that he recalled addressing a mass meeting of employees at which Mayorek was also present and at which he spoke about a wage package and that this meeting took place prior to the strike on April 11, 1977.

39/ Lucille Barsi is a group leader on the production assembly line, a job category alleged by the General Counsel to be supervisory in nature. According to Barsi, a group leader is responsible for "running the line, make sure they do everything right and show the girls what to do." She also "makes sure the assembly line employees have all their tools," starts the conveyor belts moving in the morning, assigns replacement employees if required, directs employees not working to return to their jobs, and trains new employees. Barsi receives $4.25 per hour and has no fixed position on the assembly line, while other assembly line employees generally receive $3.00 an hour and have set assigned places on the production line. Her immediate supervisor has the title "supervisor," and she has no authority to hire or fire, although she does report on an employee's work progress to those above her.

40/ On cross-examination Barsi admitted that she was unsure of the actual date of this meeting. It would appear from the record that the question used to elicit her response specified April 6, 1977 as the date of the meeting and she went along with it in her answer.

Barsi's testimony on cross-examination concerning this meeting was evasive and at times unclear to say the least. However she did relate that one of the reasons the meeting was called could have been Local 222's organizational campaign but denied that Mayorek had said at the meeting that the Respondent did not want a union. While she could again not recall much of what was said by Mayorek at this meeting, she did remember that he had not made any reference to Rizzuto in his speech and neither told the employees about the disadvantages of a union nor that the Respondent could do more for them than the Union. Barsi testified that along with Mayorek and Kampel, Arthur Marin also was present representing the Respondent. 41/

Rita Saulino, 42/ employed by the Respondent as an assembly line worker at the time of these events, testified that at the meeting in the cafeteria, Mayorek and Kampel were present and that they spoke about the benefits that the employees already had and that if the employees wanted to join a union, "it was up to us if we so choose and they didn't tell us one way or the other to go or not to go which way." She stated that the meeting lasted "no more than maybe 15 minutes or so." Saulino continued that she could not recall everything or exactly what was said at the meeting but remembered that Mayorek had told the employees that if they had any problems they should bring them to the attention of management.

Emma Socorro, an assembly line employee initially testified that she had not attended any meetings in the cafeteria during the week of April 4, 1977. However on cross-examination, after her recollection was refreshed by an affidavit given previously by her to a Board agent, she then testified that the Respondent's representatives at this meeting told the employees that if they had any problems or grievances, they can talk to management about them; that hot meals were to be supplied in the cafeteria in the future; that a new water fountain would be installed in the Respondent's plant; that a Spanish speaking "translator" would be available to assist employees in bringing their grievances to management; and that a wage increase would be granted to the employees in the future.

What Occurred on April 5, 1977

Stephen Olah testified that on or about April 5, 1977, William Reed, his supervisor, informed the employees in the warehouse department that Irving Green, the "head of the supervisors" wanted to talk to them individually in Reed's office. Olah stated that when his turn came he entered the office and Green asked him if he had any problems, to which Olah responded, "And I said that I didn't think it was right that people were being hired and people were in the plant weren't being promoted." According to Olah, Green wrote down what he said in a notebook and then told Olah that, "if I had any problems, his door is open." Olah added that while he had received work orders from Green on previous occasions, he had never personally spoken to Green before, "on that kind of

41/ As noted before Arthur Marin was not hired until June 1, 1977.
42/ Saulino, at the time she testified at the hearing, had been transferred from her assembly line job to the Quality Control Department.

level." Olah related that Green also spoke to Thomas Pruchnik, Glen Scarano, and Richard Geseck, the other employees in the warehouse department. 43/ While Green testified as a witness for the Respondent he did not deny this occurrence.

The Meeting of April 6, 1977

The evidence herein shows that during the afternoon of April 6, 1977, the Respondent held another mass meeting of its unit employees, this time in the production area of the plant. 44/ Leandro Rizzuto, the Respondent's president, addressed the employees interpreter from atop a platform composed of wooden skids using an interpreter to translate his remarks into Spanish.

Stephen Olah testified that Rizzuto said:

> . . . he had heard that we were trying to start a union, and that with a union it--he couldn't--we couldn't be like close to management; we would be separated from management with a union. He pointed out what the company had done for us, the air conditioning, the enlargement of the cafeteria, a profit-sharing plan that was available only for non-union members. He went on to say that if a union came into the plant and it was--and the workers on the line were making $5 an hour, he would come out and work on the line himself. And he said that it would be unprofitable for him to stay if a union came in. He went on to say about the wage package deal, . . . that was going to be given to us on April the 18th--and, if we didn't like it, the door would be open; and, if we had any problems, to come--we can go to our supervisors or go right to him and talk to him. . . . I know there were other things said, but I can't remember right now what--like I said, it was a year ago.

43/ Pruchnik, Scarano, Geseck, and, as indicated before Olah, all signed authorization cards for the Union.

44/ The General Counsel's witnesses, at least those who could recall the dates on which the meetings occurred, testified that this meeting and the prior one took place on April 6 and April 4, 1977 respectively, and I accept these dates although Mayorek testified that they occurred on April 7 and April 6, respectively. Rizzuto testified that he was "out of the country" from March 24, 1977 until April 4 or 5, 1977 and had just returned from Hong Kong when the meeting at which he addressed the employees occurred. Since Mayorek testified that when he addressed the first mass meeting of employees Rizzuto was still in Hong Kong, the April 4, 1977 date rather than April 6, 1977, as he indicates, would appear more correct. Further, as will subsequently be discussed herein, and as the evidence shows, the Respondent distributed Easter holiday gifts to its employees the day after the second mass meeting occurred at which Rizzuto addressed these employees, this also being the day before the Respondent's plant closed for Good Friday, which fell that year on Friday, April 8, 1977. This would clearly indicate that the meeting took place on April 6, 1977 and not April 7, 1977.

Olah's testimony continued as follows: 45/

Q. Do you recall whether Mr. Rizzuto expressed his feelings about the Union?. . .

A. He expressed he didn't want a union at Conair. Also I remember he said about the guard. There were complaints about the guard, and that the guard's attitude would change for the better. . . .

Q. Did Mr. Rizzuto say anything about the cafeteria?

A. That they were going to serve hot food. That was one of the things he said that the company was going to do for us in the future.

Q. Did he mention a water fountain?

A Yes. He again mentioned the water fountain.

Q. What did he say about a water fountain?

A. There was going to be a water fountain put in the back of the cafeteria so the ladies wouldn't have to walk all the way up to the front to get a drink of water."

Olah added that this was the first time that Rizzuto had ever spoken to him at a meeting or otherwise before this.

Olah also related that on April 6, 1977 at about 12:30 noon, he had gone into warehouse supervisor William Reed's office to pick up some documents when Reed said, "Steve, did you sign a union card yesterday out in the parking lot?" I said no. He goes, "Because someone asked me whether you did or did not. Someone had seen you talking to one of the union representatives. I said no, I hadn't. He said, "All right. Just be careful." Reed testified that Olah initiated various conversations with him during which Olah questioned him about the Respondent's attitude towards employees joining Local 222 and "would the company move to Hong Kong, would the company fire personnel if they join the union. Questions along those lines." Reed stated that he told Olah that he "couldn't really answer any of his questions." He denied ever asking Olah about Local 222, or whether Olah had signed an authorization card or not. He stated that these conversations with Olah about the Union commenced in and around March 1977, and that he was aware that Olah was the only "union supporter in the warehouse." Reed also denied having discussed the Union with any of the other employees in his department.

45/ Counsel for General Counsel asked questions of Olah, which although leading, seemed more designed to refresh his exhausted recollection, than to in effect "tell him what to say" as the Respondent asserted was the purpose of these questions and therefore objectionable. I therefore overruled the Respondent's objections in this regard.

Florence Jacko testified that on April 6, 1977 she was advised by her line supervisor Rosa Cruz that there was to be a meeting of all employees in the production area. She stated that Rizzuto spoke to the employees from a raised platform made of wooden skids piled on top of each other and this was the first time she had ever seen him. Jacko related that Rizzuto, after giving a brief history of how he and his father had started the Company in the basement of their Brooklyn, New York, home and subsequently expanded its production facilities to the Edison, New Jersey plant, with plants in Hong Kong and Arizona, "said more or less the same thing that Mr. Mayorek said at the first meeting." She added that Rizzuto also said:

> . . . that the union would probably tell us that we're going to get about $5 an hour increase. And he said, well, if he could get $5 an hour for working on the line, he would work there himself; and that, if he had to pay us $5 an hour, he wouldn't be able to afford it, and he'd probably go out of business. . . . And he thinks we could do a better job without the union. He also said that the profit sharing would not be in effect if there was a union involved, and that anybody that was in the union wouldn't be eligible for the profit sharing. He also mentioned, you know, about the water fountain and--that there would be another water fountain. . . . Plus the guard's attitude, and--would change. . . . Well, he said he wouldn't be able to offer us anything at that time, that he would have to look into his financial records or whatever you call it, and then maybe later he would be able to tell us more. But at that time I don't remember him saying anything about any wage thing . . . He said that the doors were open, if we had anything to complain about, we could come to anybody. And, if we weren't satisfied with Mr. Mayorek or Mr. Kampel or whoever, we could come directly to him and he would help us. . . . He said, 'Right now I can't offer you any wage deal because I have to go through my financial affairs. /46/

Jacko continued that during this same week of April 4, 1977,"the 6th or the 7th," her assembly line supervisor, Rosa Cruz,

> "came over to the entire line and told us, after she had been to a meeting in the conference room . . . told us that they were going to offer us a package deal, a wage deal and whatever in about two weeks. Then she went away. And about 15 or 20 minutes later she returned and said that the exact date would be April the 18th."

According to Jacko there were about 20 employees on the assembly line when this took place. As stated hereinbefore, Rosa Cruz denied having had any

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46/ On cross-examination Jacko testified:

Q. Isn't it a fact that you were not promised any wage adjustment either to remain in the union or to leave the union; isn't that a fact?

A. No promise of anything. They just said that they would tell us about a package deal on the 18th of April.

conversations with other employees concerning anything connected with the Union or what the Respondent's representatives had said.

Noraima Mendez also testified about the meeting held during the early afternoon of April 6, 1977 indicating that Rizzuto was the main speaker and had said:

> He started talk about all improvements we have in the past, the air condition, . . . and the cafeteria being enlarged, being remodeled, . . . and some person interrupt him and ask about the raising, it was, what she make and she no satisfied. And he said by that time he cannot promise give any money, he got to see his finances before that. And after that he say very clear, I don't see why the people get involved with the union. I don't agree with that, and I no be able to negotiate with any union at all. I don't need that.

Mendez continued:

> And he repeat again, like Mr. Mayorek say, I want you people, if you have problems, you have the door open and can go to anyone, Mr. Kampel, Bob Gagas, . . . John Mayorek, even myself, don't be afraid. . . . Like /John/ Mayorek says, same words--over here big family, all Christian, and for union came in, we split the whole group and you got to wait . . . you got to realize you don't be able to solve your problem quick like now because . . . somebody going to represent you and maybe take longer than you think to solve your problem. Now you got an open door and you can see any of us, Mr. Mayorek, Mr. Kampel or even myself. But without the union we can better understand and stick together.

According to Mendez, Rizzuto also said that if Local 222 offered to get them wages of $5 an hour he would take an assembly line job himself and if he had to pay "over $5 an hour they going to push me out of business."

Concerning the April 6, 1977 meeting, Carlos Cruz testified that Ann Gere informed employees eating lunch in the cafeteria that they were to proceed to the "work area" for a meeting. Cruz stated that at this meeting Rizzuto spoke to the employees from a raised platform of wooden skids, by means of an interpreter and after introducing himself as the employees' "boss," said:

> I heard about you people trying to start a union inside here. We don't need a union because we are just like a family, we don't need one. Then he started saying the benefits that was right here, we have profit sharing there, that we won't have that if the union came in. And then he was saying about the bathrooms, they was going to fix up, the cafeteria, the designing--for hot meals they are going to enlarge it. And the working conditions are going to get better there. . . . He was saying about no more Christmas parties if the union came in, no more turkeys."

After Cruz's recollection was refreshed, concerning anything additional that Rizzuto had said at the meeting, he continued:

> He was saying if you have problems come and see . . . me, you can come and see John Mayorek or anybody else like supervisors first. /47/ He was saying he was going to hire somebody to speak Spanish to solve the problems so they can listen to him. He was saying that if he rose up the wages up to $5 an hour, that he would run out of business. And if he paid everybody $5 an hour he will come up and work at it himself.

Lucille Allen's testimony regarding the April 6, 1977 mass meeting of employees was similar to that given by the above witnesses. She stated that Rizzuto introduced himself to the employees and said:

> Conair did not want a union, and that the profit-sharing plan wouldn't be available to union members, and that somebody had lodged a complaint against a guard and he would have a guard change his attitude toward the employees. And Mr. Rizzuto said that we were all Christians and one big happy family, and if a union was to come in, it would separate the employees from the management, and that on /April/ the 18th, a package deal would be offered, and if the employees didn't like the package, the door is open. /48/

Although Maria Lopez, an assembly line employee, testified that the April 6, 1977 meeting at which Rizzuto spoke occurred 1 week after the April 4, 1977 meeting was held, and while she could not remember for the most part what Rizzuto had said, she did recall:

> He say that he was trying to help us, but he could not give us the raise that he had promised because you have to help him in order for him to help us. He said that he was going to give us a raise, but he could not give us a raise at the time he say and contemplate he would, . . . because the company was losing a lot of money, but . . . they would give us the raise later.

Lopez added that never before had Rizzuto spoken to a large gathering of employees during any of the time she had worked there. 49/

47/ Cruz testified that he had never heard about this before that week.

48/ Allen testified that Rizzuto did not specify what the "package deal" was to be nor did he make any statement about increasing employees wages.

49/ Lopez also testified about meetings held by Mayorek in the Respondent's cafeteria, with approximately 10-12 employees, each assembly line being called in at a separate time, at which Mayorek asked the employees about their problems and "if they were satisfied to be working." While she was unsure as to when these meetings were held, stating that she could not recall whether this occurred in April or in May 1977, her affidavit given to a Board agent investigating the charges herein states that these meetings occurred on April 6, 1977, shortly after the mass employee meeting described

(continued)

Rizzuto testified that the April 6, 1977 meeting at which he addressed the Respondent's employees took place in the cafeteria of the Respondent's plant in Edison, New Jersey and that Mayorek, Kampel, Raab 50/ and "one of the girls in the Company, Ida, who was doing some of the translating" were also present. He continued:

> The /theme/ of the conversation with the employees in the cafeteria was one of trying to keep them calm during the period of violence and advise them that the Company itself was not against a union, but it was against violence and was against anybody trying to enforce other rights upon people for whatever reasons they may have, and also telling the people that it is the company's position to try to protect their rights . . . and basically try to spell out some of the rumors that were spreading around about the union, about the company and what our position was going to be." /51/

Rizzuto denied threatening employees or promising them any benefits stating that, "the only thing I said with regard to benefits is that the company would continue based on its prior, you know, track record as to what it's done in the past and hopefully we could provide the same in the future once this labor unrest is put out of the way." He also denied soliciting grievances from the employees although he admitted that he did say, "We always had an open-door policy if at any time there was something that the supervisor or management cannot resolve, that my door was open for anybody to come in and see me." Again Rizzuto denied in any way implying that the plant would close and be moved to Hong Kong if the Union got in, testifying, "as a matter of fact, we advised the people that we were improving the cafeteria, which we did, and that we were going to be increasing the parking lot which is one of the previous grievances that was around, and that the work was being started within a short period of time." Rizzuto continued that the only reference he made to Hong Kong in his speech to

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49/ above. Lopez also alleged in her affidavit that at the meeting which her particular line attended, Mayorek had promised that the Respondent would hire a bilingual guard and give the employees a wage increase. Mayorek gave no testimony concerning these meetings.

50/ As indicated hereinbefore, Raab was called as a witness by the Respondent but did not testify about this meeting either.

51/ Aside from the fact that all the other witnesses, both for the General Counsel and the Respondent testified that the April 6, 1977 meeting was held in the production area of the Respondent's plant, it should also be noted that the acts of violence or other misconduct alleged by the Respondent to have occurred on or off the picket line at the Conair plant occurred admittedly on or after April 11, 1977, the date the strike began and subsequent to this meeting. Also when Rizzuto was asked if he could recall anything else that was said at the April 6, meeting he responded, "The whole theme of the meeting was basically where the people were feared as far as threats and violences and that I was just trying to calm the situation." As noted before, the strike did not commence until April 11, 1977.

the employees was, "the fact that I just returned from the trip and that we were going to get additional supply of component parts to help us with the additional assembly in this country." 52/ Rizzuto also denied saying anything to the employees about "what would happen if a union was voted into the plant."

Rizzuto testified that during the beginning of 1977 because of the Respondent's dramatic growth, he had planned to hire a personnel director in line with planned activity "to meet competitive wage structures and fringe benefits in the Edison area to attract, you know, the proper personnel to our company." He related that consideration of enlarging the cafeteria for the provision of hot food for the employees began during the end of 1976, and that written proposals had been submitted to the Respondent by various vending companies. Rizzuto added that the Respondent had a practice of distributing gifts to its employees on different occasions such as Christmas bonuses and turkeys.

Mayorek testified that he believed the meeting at which Rizzuto addressed the employees took place during the afternoon of April 7, 1977, and was held in the production area of the Respondent's plant. He related that only Rizzuto spoke at this meeting. 53/

According to Mayorek, Rizzuto said:

> He had heard that the people were--or that a union was soliciting to get in, that cards were being signed. He . . . gave a brief history of

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52/ However, Rizzuto also testified:

> Q. Mr. Rizzuto, either in one of these large meetings or in a one-on-one situation with any employees, did you ever mention Hong Kong to them?
>
> A. Well, there were rumors going around the company so far as the--that Conair was going to be expanding the Hong Kong operation and that Conair was going to reduce the labor force or whatever in Edison and what I spelled out--I don't recall if it was in the meeting of April or the one in October, that it was the position of the company to increase the percentage of production here in the country, which, you know, it is a matter of record, so I am not saying something that wasn't correct, and it was the intentions that if we all cooperated and did our work with the efficiencies and the productivity, that yes, we can surpass our competitors which, by the way we are the only company left in the country producing hair care appliances, everybody has either closed or gone overseas and we feel that Conair can exist in producing product in this country, providing our productivity and our working relationships is one that we act as a family.

53/ Rizzuto testified that Kampel also spoke at this meeting but denied that Kampel had promised employees any benefits. Rizzuto however did testify that Kampel had stated, "If there was grievances that were not being able to be rectified by the supervisors, that yes, they could come into my /Rizzuto's/ office and speak to me on it."

> the company, how it started small . . . how it built up in people . . . from actually nothing to what it is now. He expressed an opinion that the people had gotten what they had gotten by themselves as opposed to any outside help . . . and why should they have to pay to, you know, in dues, to get benefits. He told them that if they had any particular gripes or problems, that they had set up the grievance committees, that they were available, to use them. He told them if they were non-effective, that his door was open at any time. /54/

Mayorek stated that he had a "pretty good recollection of what Rizzuto had said" at the meeting, and that Rizzuto did not suggest, threaten or imply that there would be any reprisals or disciplinary action taken against employees who might sign union authorization cards nor did he promise the employees a wage package. While Mayorek could not remember Rizzuto having said anything to the employees about Hong Kong, he did testify with certainty that Hong Kong was never mentioned at any of the meetings which took place during the week of April 4, 1977. Further, Mayorek did not recall whether or not Rizzuto mentioned anything about the plant guard's attitude but he did testify that Rizzuto, after a few employees had complained about the guard, indicated that the guard would no longer "stand on the balcony," to observe employees either while at work or upon their leaving the plant. Mayorek added that Rizzuto had informed the employees that the Respondent's profit-sharing plan was for nonunion employees.

Kampel testified that he could not recall anything about this meeting or whether he was present at it at all. Additionally, upon cross-examination, two of the Respondent's witnesses, Lucille Barsi and Rosa Cruz gave testimony concerning this meeting, 55/ with Barsi testifying that Rizzuto "didn't say anything about Hong Kong. I don't remember," and Cruz stating, I never remember Lee /Rizzuto/ talk to the people. . . . I never went inside." Cruz also testified that she never heard "anyone from management" tell the employees that they didn't think that the employees needed a union.

Additional Meetings Held on April 6, 1977

During the afternoon of April 6, 1977, following the meeting described above during which the Respondent's president Rizzuto addressed the employees, the Respondent held a series of meetings with smaller groups of its employees, numbering between 10 to 15, in its executive conference room. Olah testified that sometime between 3 and 4 o'clock on the afternoon of April 6, 1977 and after the conclusion of the meeting held by the Respondent in the production area of the plant at which all the Respondent's unit employees were in attendance, his supervisor William Reed called the warehouse department employees together and

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54/ On cross-examination, however, Mayorek testified that he did not recall Rizzuto mentioning anything about "people signing cards."

55/ At the time she testified at the hearing Barsi had been promoted to the position of group leader. Rosa Cruz, was at all times relevant herein, a supervisor as indicated hereinbefore. Further, although the Respondent called and examined approximately 21 other employee witnesses, it elicited no testimony from them concerning this meeting.

advised them that management wanted a representative from each department to attend a meeting in the "front office" conference room. 56/ Olah stated that another warehouse employee, Thomas Pruchnik, and himself shared the meeting with Pruchnik attending the first half and Olah the second half. Olah related that there were approximately 12 employees there plus Rizzuto, Mayorek, Kampel, Raab, Bob Gagas, head of production, and Rosa Cruz, a "floorlady." 57/

Olah testified that when he entered the conference room and sat down, Rizzuto was standing and, in Olah's words, saying:

> That he has a place in Hong Kong that's much cheaper to operate, and that he knows that the employees are only looking out for themselves, but, if we force him, he will move to Hong Kong. He wouldn't like to do this but, if we force him, he will. And he said that--pointed out the wage package deal that would be presented to us on April 18.

He added that Rizzuto also said that, "If a union had gotten in, he would be forced to move to Hong Kong."

Olah continued that Kampel also spoke at the meeting and indicated that some of the women employees had complained about injuries to their hands while working on the production line and that the Respondent would supply them with gloves in the future. According to Olah, at the conclusion of the meeting Kampel instructed these employees present to return to their respective work areas and advise their fellow employees about what had been said at the meeting. Olah testified that Noraima Mendez and Carlos Cruz were among the employees present with him at the meeting which lasted approximately 45 minutes.

Noraima Mendez testified that on April 6, 1977 at approximately 3:00 or 3:30 that afternoon Rosa Cruz directed her to accompany Cruz to a meeting being held in the conference room. She related that present at this meeting were Rizzuto, Mayorek, Kampel, Raab, Gagas and approximately 10-12 employees from the production, service and warehouse departments, and with Martha Rivera, a production employee, acting as interpreter. Mendez stated that Rizzuto spoke during most of the meeting, "talking about all the benefits we got over there, air conditioning . . . a cafeteria . . . they going to have in the future hot food, and the company going to pay part of it so they are going to be cheaper for all employees." She continued that Rizzuto told the employees how he started the business "with $200 in the basement in New York" and said,

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56/ This conference room is in the building area occupied by the executive, managerial and clerical offices, is richly decorated with wood paneling, paintings, carpeting, and furnished with a large conference table and chairs. Kampel testified that it would be unusual for an employee to venture into this office area of the plant unless, "something, you know brought him there."

57/ It appears from the record that several of the employees testifying at the hearing used "floorlady" as a term descriptive of their assembly line supervisor.

> I understand they have called the union in and I no prepared for that. I don't want to have a union this place. I don't think they need union over here. Anybody can come to you and offer anything--as much as they want--but let's see how they are going to cut the promises. So far we did so good. So far we do the best. I don't realize you people gotting problems, and they want to call the union. But I don't need any union this place and they got a place in Hong Kong, and you got to understand I can go there in a low cost, without any headache what I got here now. Without these headaches I can shut this plant off and go there.

According to Mendez, Rizzuto also mentioned that the Respondent's profit-sharing plan was for nonunion members only; that if the Union got in the employees would have to pay high union initiation fees; "and he mention the bonus, Christmas bonus; and that Rizzuto mentioned "something" about a "package deal" in or about April 18, 1977 which Rosa Cruz would "let us know about." Mendez related that Rizzuto mentioned the Respondent's "open door" policy after one of the employees had complained about the lack of a wage raise and that he could never talk to anyone in management about it before beyond Rosa Cruz, his supervisor, because "Nobody tell him that before." Mendez continued that one of the employees "started talking about hands, how they got damaged hand," and Kampel promised to distribute gloves to the assembly line employees who needed them.

Concerning these meetings, Carlos Cruz testified that at approximately 2:30 in the afternoon of April 6, 1977, he was advised by Ann Gere, his supervisor, that his request to Mayorek to attend one of the conference room meetings had been granted and he therefore accompanied Gere to the conference room for the meeting. Cruz stated that there were about 15 employees present as well as Rizzuto, Mayorek, Kampel and Raab. Cruz continued that Rizzuto told the employees,

> . . . Conair does not want a union inside a plant, it would just separate us between the management. And so then he started saying about the benefits again, that they got good holidays right there, and the insurance plan is better than the one the union could--would offer us. Then he was saying about the profit-sharing plan, that if the union came in, we would not have that. . . . He also said if the union came in he would move to Hong Kong or Phoenix, that production there would be cheaper than it is--than it would be down in Edison. . . . He was saying about a new package deal that we were going to have, supposed to be included better wages, new wage increase, and better conditions--working conditions. . . . Well, he said that if you have any problems, just--my door is always open.

Cruz added that the new package deal was to be offered on April 18, 1977. Cruz related that Rizzuto also told them that the Respondent was hiring a new employee "for the Spanish speaking," to listen to employee problems and try to resolve them.

Cruz testified that during this meeting Kampel responded to a complaint from an employee "about ladies not having any gloves" by indicating that "starting April 11 we will give all the ladies gloves." According to Cruz, Kampel also directed those employees present at the meeting, "to tell the people about the new deal, package deal." Cruz added that the meeting lasted for approximately 45 minutes to one hour and at the end thereof, he requested permission to remain for the next meeting immediately following, which permission Rizzuto granted. Cruz stated that Rizzuto repeated what he had said at the previous meeting, ". . . that Conair does not want a union inside here. That if a union came in they would move to Hong Kong or Phoenix. . . . . Then he was saying about profit-sharing. . . . The meeting was just like before, exactly the same." Cruz indicated that he left before the meeting concluded, having remained for about 20 minutes.

Mayorek, now called as the Respondent's witness, testified that on April 7, 1977 58/ the Respondent held "four or five" meetings, each having in attendance approximately 15 employees, two of which he personally attended. He acknowledged that these meetings were not grievance committee meetings, that they were "conducted differently" and that the like of these meetings had never been held by the Respondent before. 59/ Mayorek added that representing the Respondent at the meetings he attended were, Rizzuto, Kampel, Raab, possibly Gagas, and himself. He could not recall if Rosa Cruz was present at these meetings. 60/ Mayorek related that either he or Rizzuto had suggested that management speak to smaller groups of employees after Rizzuto had addressed the mass meeting of employees, earlier that day, since Rizzuto was unsure as to whether all the employees had been able to hear his remarks.

Mayorek continued that Rizzuto did most of the talking and had "reiterated what he had said in the larger meeting," including:

58/ As set forth hereinbefore, these meetings most probably took place on April 6, 1977.

59/ However Mayorek also testified that previously, and before April 11, 1977, he had attended, "many committee meetings where groups of 8 to 12 people either from lines or from different departments have been in the meeting and have asked questions and have presented many problems and many grievances to the management." By way of explaining this he asserted that, "being most familiar with all the benefits and just about everything in the company, so I more or less spoke to everybody in '75." He remembered speaking to groups of employees as well as individually in 1975 and to "addressing groups of employees in the cafeteria in the summer of 1976." He stated that he and Rizzuto also had addressed employees at the Respondent's Christmas parties at which the employees were generally told "if they had any problems just to come and see us."

60/ Neither Rizzuto, Raab, Gagas, Rosa Cruz, nor the approximately 21 other employees called as witnesses for the Respondent, gave any testimony concerning these executive conference room meetings.

> the brief history of the company, and there were a lot of new people, and that if they didn't understand certain benefits that they had, that they could go in to me at any time. And if they didn't get an answer, they could go to him at any time. He understood that they had many gripes and many questions, if they could relate it to the grievance committee.

He added that Rizzuto also told the employees,

> . . . that he was aware that they /Local 2227 were trying to organize, and just the basic fact that he had felt that the people in the past, they had come --we had been there since 1975, and there had been many changes and many gains that the people had gotten through hard work, and through their grievances . . . on their talks with management, and that he felt that that was the best way to obtain--.

Mayorek denied that Rizzuto had made any reference to a wage package or wage increases, had made any threats or promises at all, or had made any mention of Hong Kong at these meetings. He also denied having gone to the employees, prior to these meetings to ask them if there was "unrest" or tell them that he wanted to find out what their problems were.

Mayorek testified that Kampel "might have said a few words in one of the meetings that I was at." He stated however that he was unsure whether Kampel had told the employees that management would get back to them at a later date to try to solve some of their problems and complaints raised at these meetings, including gloves for assembly line workers, although he remembered that he had signed a check for the purchase of gloves and had informed "someone that we had the gloves." Mayorek denied that Kampel had told the employees that the Respondent would be offering a wage package deal to them at a future date. 61/

Kampel, called by the General Counsel as a witness, testified that he attended only one of the conference room meetings and that the employees who attended, "approximately 12 to 14 in number, did most of the talking. 62/ According to Kampel, these meetings were "grievance commitee" meetings and that management was there "to listen to grievances," to find out what the employees'

61/ Mayorek testified, "In one of the meetings, he /Kampel/ just you know --just said, you know, we cannot say too much--say anything. Under particular laws, the management can tell you--you know, ... We can only tell you what we have done in the past." However and, significantly, Kampel testified that at the time of these meetings and in fact, at the time of any of the meetings held during the week of April 4, 1977, the Respondent's management representatives did not know "what we could say or what we couldn't say "concerning promises of benefits, etc. Further, in this regard, Arthur Marin, the Respondent's personnel director, hired on June 1, 1977, testified that it was apparent to him that, "many of the supervisors did not have the proper background in the matters of what's legal or illegal."

62/ Mayorek testified that the Respondent's management representatives did 70 to 80 percent of the talking at these meetings.

problems were and that the employees at the meeting were "spokespersons for the rest of the employees . . . there for the presentation of grievances." 63/Kampel related that the employees complained about their present terms and conditions of employment and in response to these complaints he told them that he "would get back to them at a later date to try and solve some of their problems." Kampel admitted that he promised to provide gloves for female employees on the assembly lines in response to an employee's complaint about injuries to employees' hands during production work; that he promised that communication between employees and management would be opened up regarding employee problems and complaints; 64/ that he told the employees that the Respondent would be offering a wage package to them at some future date, in response to employee complaints about their wages; 65/ and that employee complaints about a fellow employee's unfair discharge "would be looked into."

Kampel related that these meetings (I presume he was referring to all the meetings held during the week of April 4, 1977), came about because, "one of the line supervisors," whose name he could not remember, had advised the Respondent that the employees "would like to come and have a meeting with management" because of employee concern over "talk of unrest" and about the possibility of a strike. As stated in his affidavit given to a Board agent in this matter on May 2,1977, Kampel gave as a reason for the holding of such meetings:

> . . . Mayorek, Rizzuto and I had gone to the employees and told them that we heard that there had been some unrest and that we wanted to find out what the problems were. . . . Before this meeting, one of the supervisors, whose name I do not recall, told me that there were some grievances and that it would be good if we sat down and talked about it. The next day, I told one of the line supervisors, whose name I do not recall, to get the people together and bring them in. . . . /66/

63/ Mayorek testified that these meetings were definitely not "grievance committee" meetings.

64/ However, while Kampel stated that an affidavit given by him to a Board agent was only "partly correct," he acknowledged in this affidavit that he had made such promises. Further, Kampel testified that at the time of the meeting he had thought communications between employees and management was good and was surprised to find out that it wasn't.

65/ Kampel testified that when advised subsequently by legal counsel that such a promise might be illegal, the Respondent, through its management representatives, thereafter advised its employees "that Conair could not offer the wage package or anything else until the labor problems were resolved."

66/ Interestingly, during his testimony Kampel denied the truth of some of the statements he had made in his sworn affidavit, stating at one point, "Yes, that correct, but that's not correct now." However he really never explained why the truth thereof had changed during the passage of time.

Kampel testified that by the term "unrest" he meant that the Respondent had heard that there were grievances and problems among the employees and that some employees were contemplating going out on strike. Moreover, Kampel also testified that another reason for the meetings being held was because "the union was organizing and there might be a strike."

Additionally Kampel testified that he, Rizzuto and Mayorek were present at these meetings on behalf of the Respondent along with an interpreter. Kampel was unsure as to whether Raab or Gagas attended these meetings and did not " know if Mr. Rizzuto really said anything at this meeting." He admitted that he had never met with employees before "in a formal way," nor ever before discussed, with employees as a group, their problems. Kampel denied that any of the Respondent's management representatives had said anything about the Respondent's attitude toward union representation of its employees nor in fact anything about the Union at all. Kampel could not recall Rizzuto stating anything about it being unprofitable for the Respondent to stay in Edison, New Jersey, if the Union came in and denied that anyone from management had threatened to close the plant and move to Hong Kong.

What Occurred on April 7, 1977

It is undisputed that the Respondent gave each of its employees a 5-pound canned ham and a tote bag with an enclosed Easter card therein 67/ at the end of the workday on Thursday, April 7, 1977, the last working day during the week of April 4, 1977, since the Respondent's plant was closed for Good Friday. Olah testified that the Respondent had set up a table manned by Kampel, Reed, "a number of supervisors from which the hams, tote bags and Easter cards were being distributed. He stated that as he received these items, Reed, his supervisor, "shook my hand and told me 'Have a nice Easter.'" Olah added that he had been employed by the Respondent during the previous Easter of 1976, and had received no gifts at that time.

Additionally, witnesses for the General Counsel, Jacko, Mendez and Allen, also testified similarly to the distribution of canned hams, tote bags and Easter cards by the Respondent on April 7, 1977. Both Mendez and Allan indicated that John Raab and Bob Gagas greeted employees as they were leaving the plant and handed them the hams, tote bags and Easter cards. Mendez indicated that after receiving the "ham with shopping bag," John Raab "shook my hand but never before he even talk to me or nothing. He says I hope you have a nice Easter and I say you too."

67/ The tote bag has "CONAIR" printed on it and is sold by the Respondent as one of its products.

Mayorek confirmed that the Respondent, on April 7, 1977, gave canned hams, tote bags and Easter cards to all of its employees; 68/ that the distribution thereof was accomplished by six to eight supervisors including Raab, Gagas, and Ann Gere; and that the Respondent had never before given its employees "gifts" at Easter time. However, Mayorek testified that the Respondent had given turkeys to its employees for Christmas, 1976 prior to the commencement of Local 222's organizational campaign at Conair. Mayorek continued that management discussion about distributing turkeys or hams to its employees at Easter, 1977, began "months prior to April," although he did not know the exact date or circumstances. He alleged that the hams were "ordered verbally" by Green in the early part of March." Green testified that John Raab had directed him to purchase the hams in "mid-March" 1977, although he was unsure as to the actual date. 69/

The Strike

The uncontradicted evidence herein clearly establishes that a strike ensued at the Respondent's plant, commencing on April 11, 1977 and concluding on September 23, 1977.

Background

Jerry Rivera, assistant manager for Local 222, testified that on Wednesday, April 6, 1977 "about 25, 30" of the Respondent's employees appeared at the "union hall," 81 Smith Street in Perth Amboy, New Jersey, some requesting the return of the authorization cards they had signed because "we want to stay with the company, we don't want to lose our jobs." According to Rivera these employees explained that "the company had several meetings with them that week, a lot of threats were made that they were going to close down the shop and move the shop to Hong Kong and that they were going to lose the benefits that they have, and only these benefits will be there for those people who will stay out of the union . . . that if the union ever organized our shop--they will go out of this business and move their business to Hong Kong." 70/ Rivera added that he told these employees that the Respondent's actions were illegal, that Local 222 could file unfair labor practice charges against it and that he would inform the Union's manager Hugh Harris, as to what had occurred. Rivera continued that after he spoke to Harris, a meeting was arranged with the Respondent's employees for the following day.

68/ Rizzuto testified that since the Respondent opened its plant in Edison, New Jersey, it has always given gifts to its employees, i.e., Christmas bonuses, turkeys for different occasions, parties, loans to employees, and perfume, scarves and handbags from overseas.

69/ The Respondent proffered into evidence a check dated April 5, 1977, in the amount of $3,187.00 for the purchase of 344 5-pound canned hams, signed by Green, and a receipt and invoice, both dated April 7, 1977 for the hams. Alhough Raab testified as a witness herein he gave no testimony concerning the above.

70/ In his affidavit given to a Board agent during the investigative stage of proceeding, Rivera does not mention anything about the Respondent moving its business to Hong Kong.

The record discloses that on Thursday, April 7, 1977, somewhere between 4:30 and 5:45 in the afternoon a meeting was held between Union officials and approximately 50-60 of the Respondent's employees at which Harris addressed the employees. 71/

The testimony of both Rivera and Harris concerning what was said at this meeting is similar. After the employees reiterated what they had told Rivera the previous day, as set forth above, Harris informed the employees about the procedures used to organize a plant, that if Local 222 obtained a majority of signed employee authorization cards it could demand recognition by the Respondent as the employees' collective bargaining representative or alternately, "obtain 30 percent of their signatures and then petition for an election at the National Labor Relations Board." Harris testified that he told the employees that "based on the incidents that were occurring at the plant that we had another alternative, that we could protest these unfair labor practices by calling an unfair labor practice strike, . . ." Rivera testified that Harris advised the employees that "it was illegal for the company to make threats like that. . .," that Local 222 could file charges against the Respondent with the Board and that "we could always legally strike. . . . " Rivera and Harris both stated that the employees "responded enthusiastically" to the strike action alternative. According to Harris the employees present indicated their opinion that a majority of the Respondent's employees "were interested in the union and that they would be willing to join an unfair labor practice strike." Harris continued that he told the employees that Local 222 would "examine the best procedure we felt at this particular time . . ." after which the meeting was concluded.

Both Rivera and Harris testified that after consultation with other officials of Local 222 72/ on Friday, April 8, 1977, it was decided to call a strike to commence on Monday, April 11, 1977 at 6:30 in the morning of that day. Rivera added that "we called the rest of the staff, union business agents, organizers, and we let them know that we were having a strike on April the 11th, gave them the address and to be there at 6:30 in the morning."

71/ Harris testified that the meeting was held "to find out directly from the workers as to what was going on inside the plant." He stated that Rivera translated his remarks to the employees into Spanish since the employees who attended the meeting were "predominantly Spanish speaking people."

72/ Harris, Rivera and Local 222 organizers, Joseph O'Keefe, Georgio Santana, Olga Morales, Rafael Burgos and Genovena Rivera.

The Strike - The First Days, April 11 and 12, 1977 73/

Rivera testified that on Monday, April 11, 1977, ". . . we showed up--I was there at 6:30 in the morning, and we had strike signs and when the people got there, they saw the signs and they--those people that wanted to go in, went in." He stated that there were "about 15 union organizers there," 74/ and that approximately 125-130 of the Respondent's employees joined the strike during the course of that day, with "a little over 100" people also picketing at the Respondent's premises the following day, April 12, 1977. Rivera also testified that the picketing on both April 11 and 12, 1977 was peacefully accomplished without any interference with employees seeking to enter the Respondent's plant to work. He continued that thereafter, from April 13, 1977 until the end of the strike on September 23, 1977, the picketing continued in a peaceful manner without any attempt on the part of the picketers to forcibly stop trucks from entering upon the Respondent's premises or to prevent employees from

73/ The parties stipulated that the following employees "ceased work and went out on strike on April 11, 1977 and that these employees participated in the strike and picketed during the course thereof until the strike ended on September 23, 1977:" Lucille Allen, Verta May Allen, Miguel Aquino, Genovena Arocho, Maria Arocho, Shirley Bagby, Michael Billings, Etta Burns, Hector Carabello, Yvette Casquette, Olga Chalfa, Raymond Crespo, Celia Cruz, Dominga Cruz, Rosita Cruz, Martha Davison, Christina De Armas, Hilda Della Torre, Patricia Eaford, Celia Febles, Ana Rose Fernandez, Noris Garcia, Margarita Gautier, Lydia Gonzalez, Wilfredo Guerrero, Gloria Guzman, Hiriam Guzman, Florence L. Heimbuch, Juan Hernandez, Carmen Irizzary, Florence F. Jacko, Alice Jones, Beulah Jones, Flora F. Kurtanick, Evelyn Lee, David Letendre, Richard Letendre, Dorothy Lodato, Carmen Lopez, Enrique Luciano, Rosaria Machin, Victor Maisonet, Irene Martinez, Laura Martinez, Luz M. Melendez, Jose R. Mendez, Miliady Mendez, Noraima Mendez, Rosalia Mendez, Roberto Mercado, Elizabeth Muniz, Milagros Muniz, Jose Negron, Antonio Neiro, Adamina Nieves, Adolfo Nunez, Jose Nunez, Stephen Olah, Luis B. Ortiz, Alida Pabon, Adrian Pagan, Annette Palmer, Martha Parada, Julia Pellallera, Hilda Perez, Yillian T. Perez, Denise Perrotte, Lilia Quiles, Olga Rios, Alicia Rivera, Jose R. Rivera, Virginia Rivera, Awilda Rodriguez, Gertrudes J. Rodriquez, Ana Santiago, Rufina Saez, Jesus Santiago, Jose Santiago, Wildilia Santiago, Carmen Sanson, Carmen M. Sagardia, Ernesto Soto, Portinia Soto, Rosaur Soto, Ismael Torres, Sonia Torres, Aida Iris Torrez, Rafael Valdes, Alberto Vargas, Felix Vazquez, Jose Vazquez, Wilfredo Vazquez, Elsi Vega, Luz C. Villanueva.

Excepted from this stipulation were, Verta May Allen, Millagros Muniz, Alida Pabon, Olga Rios and Sonia Torres. However each of these employees testified in this proceeding that they were employed as assembly line workers, had signed Union authorization cards, joined the strike on April 11, 1977 and picketed until it ended on September 23, 1977.

74/ Rivera denied that Local 222 had brought "two busloads of approximately 125 people" to the Respondent's premises to picket as alleged by the Respondent. Additionally Harris testified that the Union had made no arrangements to transport its "personnel to the Conair site" because "each organizer had their own automobile."

entering or leaving the Conair plant and that he saw "no violence committed against persons," and no "truck tires slashed." 75/

Harris testified that when he arrived at the Respondent's premises at approximately 8:30 on the morning of April 11, 1977, he observed about 140 people gathered at the plant and stated with regard to the strike signs they carried, "Some of the workers were carrying the signs and some of the signs were put on the windshields of parked cars. 76/ Harris related that he recognized some of the people on the picket line as being the same Conair employees who had previously attended the Union meeting on April 7, 1977. He added that he remained at the Respondent's premises until approximately 9 a.m. at which time over "100" of the striking employees were placed aboard two "rented" buses which had been parked and waiting near the Conair plant, and transported to the "union hall" in Perth Amboy, New Jersey, for a meeting 77/ with a a few of the Union's organizers remaining at the plantsite. Harris stated that at approximately 11 a.m. the employees, who had gone to the union hall were returned to the Conair plant and instructed to picket "on a systematic basis . . . in an orderly manner," and not to stop anybody from entering or leaving the Respondent's premises. After remaining there for "maybe five minutes" more, he left. According to Harris, while he was present at the Respondent's plant, the pickets behaved in an orderly manner.

75/ In this connection there is evidence in the record that the Respondent obtained an injunction in the Superior Court of New Jersey on April 13, 1977 to restrain violence at the picketing site and to limit the number of pickets at the Respondent's premises thereafter. Rivera acknowledged that the Respondent had subsequently "charged" Local 222 with violating the injunction and had made application to the Superior Court to punish Local 222 for contempt. This matter is still pending before the Court.

76/ Harris testified that each union organizer was given five or ten of the signs to distribute to employees who supported the strike and who joined the picket line. These signs read,

> Workers of Conair on Strike-Unfair Labor Practices--
> Please don't cross picket line!--International Ladies
> Garment Workers Union, AFL-CIO, Local 222.

Further, John Raab, the Respondent's vice president in charge of operations, testified that at the beginning of the strike he saw between 15 and 20 signs being carried by people on the picket line, some of whom were employees of the Respondent and that the signs read, "Unfair Labor Practices" and "On Strike, Local 222." Richard Escala, a supervisor, testified that after he arrived at Conair on April 11, 1977, he learned that there was an unfair labor practice strike in progress.

77/ The Respondent asserts that based upon the evidence herein, the conclusion is "inescapable that the Union had assembled a private army to intimidate employees into joining the Union and to prevent their entry into the plant, and that these two buses were used to transport these non-employee pickets to the Conair plant on the morning of April 11, 1977. While the evidence concerning these buses is set forth in greater detail hereinafter, suffice it to say at this point that the record in this proceeding does not support such a conclusion as advanced by the Respondent.

Harris continued that he returned to the Respondent's premises on April 12, 1977 at abut 7:30 a.m. remaining there "about five minutes" and observed "about 20 Conair employees, . . . some organizers with picket signs . . . and the picketing going on in an orderly fashion." He stated that he was in touch with Rivera all during that day and Rivera, who remained on the picket line at the Respondent's plant throughout the day, reported to him that the picketing was being conducted in an orderly fashion. Harris also testified that on April 13, 1977 he stopped by the strike site "after eight" and saw that the picketing was being carried out again in an "orderly fashion."

Olah testified that he arrived at the Respondent's plant at about 7:15-7:30 a.m. on Monday morning, April 11, 1977, "I pulled up, . . . all the employees it seemed to me were outside. And I pulled my car over to the side of the road and there were people--strike signs on, 'Unfair Labor Practice, Local 222.'" Olah continued that he left his car and spoke to "a union official, Joe O'Keefe" who informed him "that there was an unfair labor practice strike, and it was illegal for them /the Respondent/ to hold meetings, and that some of the employees there had been fired." Olah added that he joined the strike on April 11, 1977 and picketed until its conclusion on September 23, 1977. He continued that there were as many as 100 people or more on the picket line on September 11, 1977, and while he, himself, had not witnessed any acts of violence he subsequently "heard of it afterwards." 78/

Additionally Florence Jacko, Lucille Allen, Noraima Mendez, and Carlos Cruz, all testified similarly that they arrived at the Respondent's premises on Monday morning, April 11, 1977, somewhere between 7:15 and 7:30 a.m., at which time they observed as Jacko characterized it "a lot of people standing outside," including representatives of Local 222 and many of the Respondent's employees. 79/ They all related that they were advised by the Union's organizers standing outside the plant that a strike was in progress and were asked to join Local 222 which they did, signing union authorization cards on that date except for Cruz who had already signed a card previously on April 1, 1977. Jacko testified that there were "large groups of persons" on the picket line only at the beginning of the strike and that she never saw any violence at the plant site but "I heard of it." 80/

78/ Olah testified that he was not on the picket line each and every day during the course of the strike. Olah was personally involved in an occurrence, herein referred to as the "Wahler Incident," which occurred on July 21, 1977 in front of the Respondent's plant more about which will be discussed hereinafter.

79/ Jacko testified that there were between 20-25 union representatives at the Respondent's premises that morning, Allen, 10-15, and Mendez, 20-25. They also testified that they saw approximately 150 employees outside Conair or on the picket line.

80/ Additionally, Genovena Arocho, Rosalia Mendez, Celia Febles, Luz Melendez, Sonia Torres, and Olga Rios, all witnesses for the General Counsel, testified that the picketing was orderly and peaceful during the various hours that they were on the picket line on April 11 and 12, 1977. These witnesses all signed authorization cards for the Union and picketed during the course of the strike.

The testimony of the Respondent's witnesses depicts a quite different scene at the Respondent's plant on April 11 and 12, 1977, than that set forth by the above witnesses for the General Counsel. Raymond Gahr, employed by the Respondent as a truck driver, testified that upon his arrival at the Respondent's plantsite on Monday morning, April 11, 1977" between the hours of 6:30 and 7:00 o'clock," he observed , "people were standing in . . . front and the back driveway of the building." He continued, "a few people" approached his car and advised him that a strike was in progress, that "the strike was to protest unfair labor practices," and asked him to join Local 222 and support the strike. 81/While he stated that the people outside the plant could have been employees of the Respondent, he wasn't sure of this since he was unfamiliar with assembly line workers in view of the nature of his job. Gahr related that he additionally observed, ". . . truck's windows were broken, headlights were broken, a car or two had broken windows up." He added that because the rented truck which he used had had its headlights broken and windshield smashed that day, he had gone to return it to the truck rental company and upon his return to Conair, rocks were thrown at the body of the new truck he was driving.

Gahr testified that on the following day, April 12, 1977, he only made one trip outside the plant at which time rocks and bottles were again thrown at his truck, hitting it. He related that thereafter the Respondent's trucks were parked somewhere else in Edison, New Jersey away from the Respondent's premises, or in Metuchen, New Jersey, "And about a week or two later I went to get my truck from there . . . and I seen my front windshield was smashed again, and a few of the other trucks that belonged to us were also had windows smashed."

Mayorek testified that on Monday morning, April 11, 1977, when he arrived at the Respondent's premises "a little after 7," he observed two buses parked nearby 82/ and "a large group of people . . . between 100 and 150 . . . at various points on the lawn, in the back, in the rear parking area, near the trucks, the truck bays, some up towards the front of the offices, office sections, and there were about eight to ten police cars there with--about 20 to 25 policemen with helmets. . . ." 83/ Mayorek continued that he approached the policeman after parking his car, and testified that "They said that they had been called down, that there was a riot down there." He stated that he then spoke to Jerry Rivera about what was happening and Rivera told him that Local 222 was "calling a strike." 84/ Mayorek added that Rivera also said, "that he could

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81/ While Gahr did sign an authorization card for Local 222, he admittedly did not support the Union or the strike nor did he engage in picketing, instead reporting for work each day.

82/ Several others of the Respondent's winesses also testified that they observed two buses near the Respondent's plant when they arrived for work on the morning of April 11, 1977. See for example the testimony of Raymond Gahr, Delafina Rodriguez, Jerry Kampel, Richard Escala and Rosa Cruz.

83/ Mayorek testified that Louis Ruzzo, the shipping department supervisor, had called the police that morning.

84/ Concerning what Rivera told him about the strike Mayorak testified, "I know there was additional words. He might have indicated that there was an unfair labor practice strike."

not--was not able to control the people at that point in time," and because of this Mayorek requested that the police "hang around as long as they can." He related that two or three police cars remained at the Respondent's premises "with a few men in it."

Mayorek testified that at about this time the Respondent's employees started to arrive for work, it then being approximately 7:30 a.m. and that,

> "a group of people . . . in front of our building beyond the next road, . . . would stop the cars and they would tell the people that there was a strike at Conair, . . . turn your car around and go home, support the strike."

He related that he tried to convince several of these employees to enter the plant and report for work, telling them, "that there was no problem, to go up the road and the police would guide them into the building," but was unsuccessful because they "were frightened" and "they didn't want to get involved in any violence." Mayorek added that "one of the union people who was talking to a group of people in a car . . . held me back from trying to convince the people." 85/

Mayorek testified about various incidents which occurred on April 11 and 12, 1977 commencing with the arrival of the Respondent's employees at the plantsite that Monday morning. Mayorek stated that as the Respondent's employees approached the Conair plant and attempted to drive their automobiles "through the lines or groups of people that had blocked the two entrances, their cars were pounded upon." He related that he heard the sound of automobile windshields breaking and observed one car with its windshield broken being driven through the picket line by a "girl." He continued that employees who had driven across the picket lines and reported for work at Conair had the tires slashed on their cars

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85/ With regard to Mayorek's actions along these lines, Noraima Mendez testified that on April 12, 1977, the second day of the strike, upon her arrival at the picket line at about 8 o'clock that morning she observed "less than 20" Union officials present there "and a little over 100," employees, since some of the employees who had been on the picket line the previous day had returned to work because "they was afraid they'll lose their job." Mendez continued that she was saw met by Mayorek and Rosa Cruz "in the middle of the road about one block away from the company" at which time Cruz said to her, "No. Nora, you better go back to the company because . . . they need you, otherwise you are going to lose your job." She added that Mayorek said, "Well you don't have to be afraid, the police will be there, they can take care of you, you know." Mendez added that Flora Fernandez was present when this happened. Cruz did not deny this testimony, and, since Fernandez moved to Florida and did not return to work after the strike ended, she did not testify at the hearing.

parked in the Respondent's parking lot. 86/ Mayorek added that during the course of the day he observed employees' cars being prevented from entering the Respondent's parking lots and the employees were told "to turn around and go home." 87/

Mayorek continued that of approximately 200 production and warehouse employees, employed by the Respondent at the time, between 50 and 75 "got through" and reported for work on April 11, 1977. He added that during the day, the Respondent received "various phone calls" from employees requesting transportation to work by bus or car, and the Respondent dispatched a station wagon and a minibus to pick up groups of employees. While Mayorek stated that the following incident took place on April 11, 1977, the evidence herein indicates that it actually took place on April 12, 1977. Be that as it may, Mayorek testified that when the minibus returned to the Respondent's premises laden with "approximately ten individuals" as passengers, it was ". . . prevented from coming in. As the driver was blowing his horn and inching slowly through the people, a bottle was thrown . . . through the driver's side, right in back of the driver's side, the window. And the glass shattered on the individual sitting in that particular seat . . . . It was Ino Febles . . . in that particular seat where the glass struck." 88/

86/ According to Mayorek, over 40 tires were slashed on cars that day. Additionally Maria Rabosa, employed by the Respondent as a solderer on the assembly line, testified that on April 11, 1977, after completing her work day she proceeded to her car which was in the parking lot where she discovered that the rear tires were flat, "they had been cut." However she stated that she actually did not see the cuts in the tires, "But they were completely on the ground, you know, without air . . . . I don't know exactly, but they were like they were cut." She added that the Respondent supplied her with two new tires for the car. Yvonne Marie Stanley, a secretary employed by the Respondent, also testified that on April 12, 1977, "I had two right side tires of my car cut or slashed.

87/ Delafina Rodriguez, an assembly line employee, testified that when she appeared for work on Monday morning, April 11, 1977, she was told by a group of people at the Conair plant that a strike was in effect and not to go to work. Becoming frightened, she did not report for work that day but instead returned home. Jerry Kampel testified that on the first day of the strike he observed employees on the picket lines who wanted to return to work but were prevented from doing so by other striking employees. He estimated that approximately 25 percent of those who remained out during the strike did so involuntarily..

88/ See Respondent's Exhibit 33(18), a photograph showing broken glass littering the floor of a bus-like vehicle near a passenger's seat with a broken bottle top among the glass debris. Arthur Taylor, the Respondent's "import manager," testified that he had taken this photograph of the minibus' interior with the shattered window.

Mayorek also testified that while the minibus was used to transport approximately 15 employees from Brooklyn, New York to the Conair plant in Edison, New Jersey from April 12, 1977 to the end of June or early July of 1977, and a larger bus used thereafter until the end of the strike on September 23, 1977, the only incident he knew of involving an assault upon

(continued)

Concerning this incident, Gahr testified that on April 12, 1977, at about 8:30 that morning after his arrival at work, he was requested to drive a "small bus van" owned by the Respondent to Perth Amboy, New Jersey to pick up employees who "wanted to come to work." He stated that he had no trouble leaving the Respondent's premises but upon his return after picking up the employees and while nearing the premises, rocks were thrown at the van. Gahr related that he immediately drove to the Edison police station where he reported the incident and was advised to return to Conair and that a police escort would be provided. He continued that as he entered "the entrance of Conair . . . a bottle or rock" was thrown through a back window shattering the glass. He added that there were "12 to 15 ladies," employees, in the van at the time and some of these were cut by the flying shattered glass.

Emma Soccoro, an assembly line employee, testified that on April 12, 1977, she traveled to work in the Respondent's "minibus" driven by Gahr. Her account of what happened is slightly different than that given by Gahr. She stated that the minibus was "attacked" by several men in a car while the employees were enroute to the Conair plant whereupon Gahr immediately drove the vehicle to the "police station for help." Upon their return to the Respondent's premises with a police escort and, according to Socoro, when they were at " the front of the plant," stones and bottles were thrown at the bus and, "they broke the glass of the bus, and there were two persons who were hurt." Socorro related that the bottle came from a group of 6 or 7 people standing "outside." Georgina Echevarria, another employee passenger on the bus testified similarly to the above but while Gahr and Soccoro could not identify any of the injured employees, Echevaria named Carmen Enrique and Joan "something" as having sustained cuts from the broken glass. 89/

Mayorek recounted another incident which occurred that day involving an employee named Josephine Torres, who at the end of the work day when she was preparing to leave the Respondent's plant, discovered that two of the tires on her car had been slashed. During her conversation with some of the people on the picket line nearby concerning this, "she was knocked down in the middle of the crowd." After the appearance of her boy friend she left the premises "in tears." Mayorek continued that when Torres returned later that evening the Respondent had replaced the two damaged tires on her car with new ones.

The testimony of Torres, Raab and Green concerning this incident was similar in nature.

Josephine Torres, an assembly line employee, testified that at the completion of her work day as she was leaving the Conair plant, ". . . was still

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88/ the buses or their occupants occurred on April 12, 1977. He stated that the Respondent also used a chartered bus to transport employees from Perth Amboy, New Jersey to Conair on April 12, 1977 and although the record is not clear about chartered bus use therefter, there was no misconduct involving any of the buses.

89/ Additionally, Delafina Rodriguez, Dilsa Perez, Carmen Enrique and Ino Feebles, the latter actually being the other injured employee passenger on the minibus, all testified similarly, as above, concerning this incident.

the whole mess of people out. When I was walking towards my car a lady came and push me to the ground, knocked me to the ground. So the policeman grabbed the girl and I don't remember exactly--it was Mr. Green or my fiance who pick me up from the ground and walk me to the car." She stated that earlier, after she discovered that the tires on her car all had been slashed, she returned to the plant and telephoned her fiance to pick her up and to drive her home. Torres added that it was Grace Lopez who pushed her, that Lopez was not one of the Respondent's employees and that she sustained a twisted ankle in her fall. She continued that while driving home in her fiance's car and while stopped at a traffic light, another car pulled alongside whereupon Lopez emerged from the other vehicle and tried "to grab my daughter" who was also in the car, the while Lopez threatening to kill both Torres and her daughter. According to Torres, her fiance used a "CB" radio to call for police assistance, which ended this occurrence, and later that evening she observed the same car in which Lopez had been a passenger earlier, drive past her home. She also observed Lopez on the picket line on subsequent days during the strike. 90/

Mayorek testified additionally that on April 11, 1977, rocks and bottles were thrown "through the front windows of the building" on both the upper and lower levels, and that the Respondent's delivery trucks " . . . were actually prevented from leaving the premises. Their windshields had been broken earlier in the morning." 91/

Richard Escala, an assembly line supervisor called as a witness for the Respondent, testified that he drove to the Conair plant on Monday morning, April 11, 1977, arriving there at 7:45 a.m. at which time he was prevented from entering the Respondent's front or rear entrance driveways by "groups of people," who told him that he "couldn't get in to work." He stated, "And I tried to get in, and I was warned not to get in or they'll get /me/ later." Escala related that sometime during that morning, being concerned about his car "being out there," he went to the second floor of the Respondent's premises, "And while I was looking out of the window, a big rock came flying through the window, broke the window. I got splattered with glass on my head and my face." He added that he believed the rock was thrown, "from the group of people in the first driveway. . . . Because I also seen people throwing beer cans and beer bottles and also a little fence that was there on the driveway was pulled out." 92/

90/ While a comparison of Torres' testimony and an affidavit which she gave to the Respondent concerning the above incident evidences numerous inconsistencies in her account thereof, John Raab testified that he observed a car following the Torres' car when they left the plant that evening and John Mayorek related that "we watched . . . her and her boyfriend drive away and we watched a series of cars drive after her. Further, Lopez was never identified as a union representative and Joseph O'Keefe, a union official, testified that he did not know who Lopez was.

91/ Andrew Robert Abrimovic, a bus driver employed by an independent bus company and a witness for General Counsel, testified that while he was present at the Respondent's premises, "I saw a truck leave with a broken window."

92/ Escala stated that although he was showered with glass he sustained no injury. Various others of the Respondent's witnesses, including Raab and Rosen, testified that some of the windows in the executive offices at the front of the plant were broken by objects thrown by the pickets on April 11 or 12, 1977.

Additional incidents were testified to by others of the Respondent's employees. Louis Russo, 93/ the Respondent's dispatcher, testified that sometime in April 1977, on the same day that the picketing commenced, "when he opened the plant in the morning, . . . at about 6:15," he observed three men opening the hood of a Ryder rental truck on the side of the Respondent's premises and when he shouted at them they ran away. He continued that about 15 minutes after opening the side door of the building he heard "stones being thrown at the doors, the bay doors of the building." He related that about 5 minutes later, John Bourbakis and Anthony Schirripa, two of his drivers, came runnning through the doors which he then closed and locked behind them. Ruzzo added that when the bay doors were later opened during the course of that day he "did see people outside picketing back and forth." Russo continued that trucks owned by the Respondent had their windshields broken but he did not know how this happened. He related that during April 1977 he was directed by Mayorek to order "tires that's been punctured for our employees, and . . . windshields for our trucks that have been broken." 94/

Concerning the above, Anthony Schirripa, employed by the Respondent as a truck driver, testified that when he reported for work at the Respondent's plant at approximately 6:35, 6:40 a.m. on the morning of April 11, 1977, his motor vehicle was stopped in the driveway entrance to the plant by "approximately six to eight men, blocking the driveway, none of who I knew. And they told me that they were on strike." Schirripa stated that he told them he was unaware of any strike notice ". . . or of any union activity. So I proceeded to go to work." He continued,

> At that time, after I entered the driveway, there was another car behind me, and I noticed in my rear view mirror that they were throwing rocks and bottles and hitting that car with wood, causing the windshield to break. So I turned my car around to see if I could aid, but the other car behind me kept going, and went to the side of the building. And a group of people came running out from I don't know where, from a bus parked somewhere, and started to break windshields on the trucks that we have parked there on Conair property. And they continued to throw bottles and cursing and what-not for about ten minutes. /95/

Schirripa added that he "stayed in his car for protection" and after things quieted down he entered the plant and "we notified the Edison police." He also testified:

93/ Russo's name also appears in the record as "Ruzzo."

94/ Russo testified that some of the new tires were delivered directly to the Respondent's premises and while replacing the old tires with new ones he observed that the old tires had "small punctured holes in them," these tires being unrepairable according to "the tire company.

95/ Schirripa identified the other driver as a fellow truck driver employee named John Bourbakis.

> Well my supervisor was notified. He was there waiting for us to start work. He wasn't aware of any of this because he gets in earlier, and he said there was no one there when he got there.

According to Schirripa, during that day, whenever he or other drivers crossed the picket lines with their trucks while leaving or entering upon Conair property, ". . . again bottles and stones and wood was thrown at the trucks." He continued that all during the week of April 11, 1977, the same thing occurred, i.e. bottles and rocks being thrown at the Respondent's trucks. He also testified that of the "300 production employees" employed by the Respondent at the time he could identify about "sixty or seventy percent" of them and that the people who attacked him and Bourbakis were not employees of the Respondent.

John Bourbakis, also employed by the Respondent as a truck driver, testified that when he arrived at the Respondent's plant for work at about 6:20 a.m. on April 11, 1977 he was stopped by "11 to 15 people" blocking the driveway entrance to the Respondent's property. Bourbakis stated, "And one person comes up to me. . . . And he opens my door, and he puts his hands on me, on my shoulder; he's trying to pull me out. So, I got scared." 96/ He related that Schirripa arrived in his car at that moment and came over to Bourbakis and they discussed what to do, deciding finally to enter the plant which they did passing through the picket line. Bourbakis added, "And, as soon as we broke the picket line, Tony Schirripa and I saw these people coming with bats, and one person put it right through my windshield, a big stick. I panicked. He takes off one way; I go the other way. And, as soon as we passed, we saw one person--one person raises his hand. There was a bus parked by the side of the Conair. All the--all of a sudden we see about 40, 50 people coming out of the bus, coming after me, me and Schirripa. . . . They just came out of the bus and with sticks, throwing rocks at us. 97/

96/ Bourbakis testified that although he did not know the name of this individual, he saw him on the picket line almost every day thereafter and that, "then we found out that they were Union officials."

97/ Concerning these buses, of which there was mention hereinbefore, Andrew Robert Ahimovic, employed by the Oak Tree Bus Company as a bus driver, testified that on April 11, 1977, he and another driver, Walt Schiffner, were assigned to drive two chartered buses ". . . down to Conair corporation and . . . pick up some people, take them over to Perth Amboy to the union hall and then when they were finished with their business to come back to the corporation and drop them off." He stated that the two buses, driven by himself and Schiffner, arrived at the Respondent's premises at 7:45 that morning and at the time contained no passengers or anyone else other than the respective bus drivers. Ahimovic related that at approximately 9 a.m. about 45 passengers boarded each bus and were driven to the union hall in Perth Amboy and that later at approximately 1:15 p.m. that afternoon, these people were returned by bus to the Conair plant. He denied that there was anyone on the buses prior to the employees being loaded abroad for transportation to Perth Amboy and that any passengers emerged from the buses to charge upon the Respondent's property. Ahimovic continued that when he initially arrived at the Conair plant early that morning there were "about four or five people standing around." Thereafter, at approximately 8:30

(continued)

Bourbakis continued, "One guy took a bat, broke my lock on the door. I couldn't get out of the car. Another guy is cracking my back windshield. Another /guy/ broke my--he broke the side of my window." He testified that he was able to escape out of his car and hide under a tractor-trailer while "people with sticks were trying to hit him." I got hit in the back. And they were throwing rocks. He related that he then ran for the entrance door to the plant, was hit in the back with a bottle and, "another guy hit me with a bat." Bourbakis added that after he reached safety within the building he heard "bangs" and upon looking through the door, "saw all the windows on my car were broken . . . and then all of a sudden I saw these people. . . . And they started breaking the windshields on the trucks." He stated that the police arrived on the scene and "we made a report" about what had occurred. Bourbakis related that he observed Jerry Rivera, a union official, talking to some of the people who had attacked him and that between "10 and 15 people" were originally involved in the attack on his car but that "after we broke the picket lines, everybody came out of the bus, and they started coming at us in the parking lot."

While Bourbakis initially denied that he and Schirripa had gunned their cars in an attempt to force a way through the pickets blocking the rear entrance driveway, in an affidavit given to a Board agent and during his cross-examination he in effect admitted that he and Schirripa had actually forced their way through the pickets and that it was only after he had panicked and driven his car through the picket line that his windshield was broken. 98/ Also in this connection Schirripa's testimony is interesting to note:

> Q. And at the time you went forward had they parted so you could get through?
>
> A. They parted.

97/ that morning, as people arrived on the scene this increased to some 60 or 70 persons "milling about" with some of them "yelling." Additionally, although the time at which it occurred varied according to the particular witness' testimony, Florence Jacko, Lucille Allen and Noraima Mendez, all testified similarly that, after remaining on the picket line for a time, Local 222's representatives advised the striking employees that a meeting was to be held at the Union's meeting hall in Perth Amboy and that for those who wished to attend, Local 222 had provided two buses to transport them there. According to these witnesses, approximately 150 employees attended this meeting. Further there is evidence in the record that would indicate that Bourbakis would be unable to see people getting off the buses where they were parked in relation to where he was situated on the Respondent's driveway when the alleged mob exited from the buses to attack the trucks in the Respondent's parking lot. (See Raab's testimony concerning this.)

98/ Further, Bourbakis also testified that he was a "hitter" for the "Fur Workers Union" and knew about union violence in "trying to get into a plant," explaining that "a hitter is when people--the union wants the workers to do something and they object to it, they send a hitter to do a number in after work. They wait for you in an alley and they beat you up."

Q. Did you go through fast?

A. Straight through.

Q. And they jumped out of the way.

A. I guess they did.

. . .

Q. You didn't take any chances; you backed up; you got your speed, and you went right through?

A. I went to work. That's right.

. . .

Q. And when you went into the plant, into the driveway, was Mr. Bourbakis right behind you?

A. He was.

Q. And was he going the same rate of speed you were going?

A. Well, he slowed up for some reason.

Q. And it was when he slowed up that his car was hit?

A. That's correct.

Additionally, Bourbakis denied that any of the people he saw on the picket line were employees of the Respondent. He however acknowledged that he only knew the "people working for the shipping, receiving department and the front personnel, inside the front where the secretaries are, and the executives," and not the "Hispanic workers at Conair," except for "about 40 in the back because they come and go." He also admitted that at least "three quarters" of the people he saw in front of the plant on April 11, 1977 were "Hispanic."

William Mintchwarner, a police officer employed by the Edison Police Department, 99/ testified that he arrived at the Respondent's plant on April 11, 1977 at 7:15 on the morning of that day and observed "about somewhere in the vicinity of 150 people or so milling about Executive Avenue, Mill Road in front of the entrances at the time." 100/

He stated, "I saw broken windows on a few trucks that were on the property of Conair's parking lot," and "two buses, I believe were there on Mill Road." He added that the police "cleared the roadway," diverting traffic and that he

99/ Mintchwarner is a patrolman attached to the Canine Division and arrived at the Conair plant that morning with his dog.

100/ Mintchwarner testified that "about 25" policemen were dispatched and arrived on the scene at Conair.

remained at the premises for about 45 minutes, leaving "a little before 8." Mintchwarner related that after the police arrived at the Respondent's premises, cars entered and left the plant parking lots without incident. Mintchwarner also testified that he visited the Respondent's premises regularly thereafter during the period of the strike, from April 11, 1977 through September 23, 1977, and that except for the above testimony concerning April 11, 1977 and the "Wahler incident" on July 21, 1977, more about which will be set forth hereinafter, he witnessed no incidents of violence to persons or property at Conair.

Stephen Szalay, another police officer employed by the Edison Police Department called as a witness by the Respondent, related that he arrived at the Respondent's premises at 7:15 on the morning of April 11, 1977 and saw "a large group of people: There were a lot of cars, two buses, and, of course, Police Officers along with myself." Szalay continued, "Well, the people were milling around in the road obstructing traffic, going to other plants in the area," whereupon the police restored a "semblance of order." He stated that he was "at the plant for about 20 minutes" and that none of the people at the Respondent's premises carried or wore picket signs nor any other sort of identification as far as he observed. 101/ Szalay testified that he visited the Respondent's plant on the average of three or four times a week during the course of the strike (April 11, 1977 through September 23, 1977), and that the pickets were "basically peaceful most of the time," and he could not recall any incidents where the picketing was not peaceful except for April 11, 1977, and a later incident involving the arrest of a union official outside the Conair plant on July 21, 1977. He added that most of the time he saw relatively small numbers of pickets in and near the Respondent's driveways acting peacefully.

Irwin Rosen, employed by the Respondent as a "Cost Accountant," testified that on April 11, 1977 as he arrived at the Respondent's premises that morning at between 8:00 and 8:15 a.m., he saw about "75 to a hundred people . . . milling around outside and people on the inside were all, I guess the best word to say is upset." 102/ He stated that during the late afternoon, at the end of the workday, "people were still milling around" and some of the female employees in the plant and offices who had worked that day were "frightened and scared because of the commotion that was going on outside," and that therefore, "a group of men from the office went outside and formed ranks so the girls could walk out to their cars and drive their cars out." 103/ Rosen added, "as the people were

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101/ According to Szalay "there were anywhere from 150, 175, 200 people there."

102/ Rosen testified that he recognized some of the people outside the plant that morning as employees of Conair and that throughout the strike some of the Respondent's employees appeared on the picket line.

103/ Rosen stated that "about 15 or 20" of the Respondent's employees were involved in this including, "John Raab, Irv Green, myself, Frank Lindsay." He added that the men formed two ranks in effect creating a corridor through which the women employees could proceed through the gathered pickets.

driving out, pickets were standing there yelling and screaming," 104/ and in some instances, "banging their hand on the car or something like that."

While Rosen could not remember if it occurred on April 11, 1977, or later into the strike, he related that rocks and bottles were thrown through the front office windows, "There was glass all over the place. . . . There were, you know,--again, between 50 and 75 people out there. They were just milling around on the front of the property." 105/

Rosen added that during the first few days of the strike he observed seven or eight cars with flat tires and saw bottles, garbage, debris and rocks thrown at cars entering upon the Respondent's premises, from behind a brick wall in front of the Respondent's plant.

Rosen related that on the "first or second day" of the strike, he was requested by either Mayorek or Raab to drive Rosa Cruz, a "floor lady" home in his own car, because the tires of her car had been slashed. He continued that the pickets outside were "vindictively screaming, Rosa, Rosa," and when he brought his car around to the back of the building she "got on the floor of the back seat to hide herself," whereupon Rosen drove her home. At the time there were "75 to a hundred" pickets present. Rosen continued that after the first few days of the strike he knew of no employees who were thereafter threatened, none who were prevented from entering the Respondent's premises to work, and had no personal knowledge of any objects being thrown by pickets subsequently. 106/

Rosa Cruz, a production line supervisor, testified that she arrived at the Conair plant at 7:30 a.m. on April 11, 1977 and saw "different kinds of people I don't know belong to Conair. She stated ". . . around 25 or 50 persons. They block my car all aound. They told me to stop and don't go through to the picket line." She added that, "after that the policeman came, they help me to go inside the company." Cruz continued that at 4:00 that afternoon she discovered that three of the tires on her automobile were "cut." She related that, "after that I was scared myself and I told the company they have to send me home and I left the company." 107/ She added that Irving Rosen drove her home that afternoon.

104/ Rosen testified that while standing there in the line, "some guy just called me a "mother fucker. And that--that if I didn't like it he'd split my lip for me." Rosen did not recognize the man. However he admitted that, "No one was assaulted."

105/ It would appear both from Rosen's testimony and from the evidence herein that the incidents he testified to above occurred on April 11 or 12, 1977.

106/ However, Rosen also testified about an incident which he alleged occurred in July 1977, when he observed "around 15 or 20" pickets stop a delivery truck attempting to enter onto the Respondent's property. He stated that the pickets spoke to the driver of the truck while "somebody with a baseball bat was banging on the front fender" and after a few minutes the truck backed up and "left the property."

107/ Cruz testified that she reported the slashed tires to "the manager," Bob Gagas.

Cruz testified that she arrived at work on April 12, 1977 at about 8:30 a.m. and saw, "The same--the same problems like before, people outside, talking nasty, throw bottles, different things they do to Conair every day. When I went the second day, I saw the same people outside and they were throwing bottles and stones to the company." She related that the pickets yelled "nasty things" at her when she entered the plant and while she was inside looking out the window during lunchtime. 108/ She continued that the pickets threatened to kill her, both while she was at work at the plant and by telephone when she was home at night. Cruz added that this happened continuously through each day of the strike.

Deborah Stachow, employed by the Respondent as a computer operator, testified that in April 1977 when she arrived at work she saw "a bunch of people outside so I assumed it was a strike." She related that she drove her car "through the driveway" whereupon her rear window was shattered. 109/ She added that "a bunch of people were screaming and yelling" and she therefore drove ahead because "I was scared."110/

John Raab, the Respondent's vice president for operations, testified that when he arrived for work at the Respondent's plant on the morning of April 11, 1977, at "around 7:30, quarter to eight," he saw approximately 100 people "milling around all in front of the entire building area. There were two buses with people in the buses to the one side of the building. People were carrying signs blocking the driveway. . . . And people shouting and yelling, blocking cars, turning people away." 111/ Raab stated that employees' cars were

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108/ Cruz testified, "I feel embarassed what they told me, they want to cut my neck, they want to cut my titty, cut my ass, very nasty words they use, no respect for a woman."

109/ Stachow identified Respondent's Exhibit R-33-10 as a photograph of her car showing the broken windshield. While the Resondent's brief indicates that she identified this photo as also showing that her tires had been slashed, neither her testimony nor the photograph support this.

110/ Stachow also gave testimony concerning an incident which occurred a month after the start of the strike. She testified that while driving to lunch with some girl friends, their car was cut off by a station wagon which "edged us over to the side of the road . . . got in front of us . . . then slammed on their brakes." She stated that she had seen the station wagon in front of the Conair plant when the employees had left for lunch that day and saw it again at the Respondent's premises after the incident occurred. However she could not identify the occupants of the station wagon. Debra Donnelly, also a computer operator employed by the Respondent and the driver of the car in which Stachow was a passenger, gave a substantially similar account of this incident during her testimony. Both Stachow and Donnally were called as witnesses for the Respondent.

111/ Raab testified that several management representatives were standing outside the plant observing what was happening, including himself, Irving Green, John Mayorek, Thomas Thomas, the security guard, John Mysak, the quality control manager, and Irving Rosen. He stated that he recognized some of the people gathered there as employees.

being stopped and many of the cars turned around and left, but that those cars which persisted and drove through the crowd onto the Respondent's premises in many instances sustained some sort of damage, i.e., broken windshields, back windows and antennas. 112/ Raab continued that he also observed that the Respondent's trucks parked on the premises had broken windshields and body damage from thrown rocks, and that the plant's "overhead loading door" had rock marks on it with rocks littering the inside of the building.

Raab related that the crowd remained gathered about the Respondent's premises during that day with ". . . rock throwing, shouting, yelling, harassment . . . ." 113/ He stated that he saw "eight or more" cars in the parking lot with slashed, punctured or cut tires and that the front reception area windows were shattered by thrown objects. He continued that while outside the plant he spoke to a fellow named "Jerry" who advised him to speak to Rizzuto regarding "talking to the union." Raab related that the crowd shouted out the names of individual employees, that of Rosa Cruz, Nancy Rodriguez and Josephine Torres and shouted "we'll get you, and you'll never get out of the building alive, things of that nature." Raab testified that at the end of the workday when the nonstriking employees were leaving work for their homes, there occurred, "again harassment of the cars trying to leave, again damage to the cars and--damage to the cars as they were getting out, people jumping on their hoods, on the back of the cars, as a matter of fact--/whacking/of the windshield, rear or front, some windshield wipers were torn off."

Raab continued that he arrived at work on April 12, 1977 at about 7:30 a.m., and observed a large crowd of people approximately the same amount as on the previous day, some carrying signs. According to Raab, the crowd "seemed to be a little more organized than it had been the day before," under, he presumed, the leadership of Jerry Rivera. He continued, "Again the employees came to work--good quantities of them--and about the same type of harassment and jumping on the cars and blocking the driveways." Raab related that cars in the parking area had their tires slashed and that while he was outside the plant's receiving area, discussing with a police officer the problem of truck deliveries passing through the picket lines, "a series of bottles" were thrown "from the mass of people" at both the police officer and himself. Raab also testified that at the end of the day while the employees were leaving the plant, "There was a lot of pushing and shoving, and there was a police captain . . . who was struck by one of those in the crowd, and then there was an arrest at that point." 114/

112/ Arthur Taylor, the Respondent's "Import Manager" testified that on April 11 and 12, he observed cars, which were entering the Conair plant, being stoned and he photographed several cars with windshields broken and tires flattened, presumably slashed. These photographs are in evidence as the Respondent's Exhibits 33 (1-36).

113/ Raab testified that while he was outside the plant in the receiving area, rocks were actually thrown at him also.

114/ There is no other testimony in the record concerning such an incident on April 12, 1977, nor the mention of who was arrested, etc.

Rita Saulino, another production line employee called by the Respondent as a witness, testified that she arrived on April 11, 1977, at the Conair premises at approximately 7:15 on 7:30 a.m. and "I saw two or three buses of people, I didn't know who they were or what but there was a lot of people hanging around." She continued that after parking her car she was stopped from entering the plant by "somebody" who told her she "could not go into the building because we were on strike." She related that when she disagreed with this admonition the man invited her into one of the buses for a cup of coffee and when she refused to go "he grabbed my arm." Saulino added that she resisted and he allowed her to enter the plant. According to Saulino when she appeared for work the following day, she observed, "Well, there was a lot of people running around, back and forth. I saw a truck getting hit by objects. Possibly it could be stones, brick."

Other employees were called as witnesses by the Respondent and testified about the events occurring on April 11 and 12, 1977, at the beginning of the strike. Georgina Echevarria, testified that when she came to work on Monday morning, April 11, 1977, "I saw many people, and they were not letting the people in, and there was a lot of commotion outside." Lucille Barsi related that the windshield on her car was cracked as she drove through the picket line on April 12, 1977. Alfred Tavera testified that when he arived at the plant on the morning of April 11, 1977, he observed a large group of people with stones and sticks in their hands who told him to turn back or they would damage his car. However, Tavera could not identify any of the people who uttered the threat. 115/

Additionally Gustavo Rodriguez, another assembly line employee and a passenger in Tavera's automobile when the above occurred, testified that when they arrrived at the Respondent's plant on the morning of April 11, 1977, "there were many people there," who stopped Tavera's car and warned them that, "if we try to get in, it wouldn't go well for us . . . they will break our car." 116/ Rodriguez stated that they then drove to the rear entranceway of the premises in order to gain access to the plant through that way but there found people throwing sticks and stones at the building and "many windows appeared broken." He added that they then drove away. According to Rodriguez, they again appeared for work at the Conair plant at about 7:30 a.m. on April 12, 1977 at which time, "we saw that there was trouble there and I told the driver of the car that we better leave because we didn't want to get into trouble or be hit or anything like that." He related that he returned to work on April 13, 1977. 117/

115/ Echevarria, Barsi and Tavera were assembly line employees on April 11 and 12, 1977.

116/ According to Rodriguez, one of the car's windows was broken in this incident.

117/ Rodriguez' testimony was incredible in part. He testified he signed an authorization card for the Union, implying that this was done at his house, "so that they would leave me alone . . ." because union adherents had visited his home on different occasions to enlist his support for the Union. However, it appears from his testimony on cross-examination that he signed the card voluntarily at the meeting held by the Union at the "union hall" on April 11, 1977. Further, after much evasiveness in answering questions regarding this, he admitted that he had failed to tell the Respondent that (continued)

Arthur Taylor, the Respondent's "import manager," testified:

> Early morning part of the day of April 11th and 12th I would go outside and the employees who wanted to enter the parking lot who were being harassed. . . . Their cars were being banged upon with their fists and people were carrying objects and hitting the cars, kicking the cars, verbally cursing the employees and on one instance I did observe the back window being broken. /118/

Interestingly, the Respondent called as a witness, Cecilia Beato, a solderer on its assembly line, who testified that in April 1977 she became aware that a strike was in progress when she appeared for work one morning at about 6:30 a.m., and she "saw all the people outside . . . policemen . . . dogs," and the people were carrying signs indicating that a strike was in progress. While she related that she never noticed any of the people on the picket line "doing anything unusual," she stated that she did observe one of the men carrying a picket sign" "write things on a piece of paper."

The Respondent also called assembly line employee Jose Cruz as a witness. Cruz testified that when he reported for work on the morning of April 11, 1977, "I found a group of people, some of them used to work there, and others did not. And some of them had signs indicating that Conair was on strike." He stated that as he tried to enter the Respondent's plant, "they told me that I could not, that I should not go in to work," and that therefore he did not report to work for that day "because I was afraid I would get into some kind of trouble if I tried to go in." He related that on a subsequent Saturday afternoon two men, whom he had seen on the picket line, came to his home and spoke to him about joining Local 222, which at the time he refused to do. Cruz added that on Friday of the week the strike commenced, he reported to the union hall where he received strike benefits, although incredibly, according to Cruz, he was told that he was being paid "for a holiday, Good Friday of the previous week." Cruz continued that he returned to work on Monday, April 18, 1977, remaining out

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117/ he signed an authorization card because he was concerned about losing his job and that he and Tavera returned to work on April 13, 1977, because of this same fear. Rodriguez' testimony concerning an affidavit he had given to the Respondent on April 13, 1977, in which he denied signing an authorization card for the Union is enlightening;

> Q. Why didn't you tell him /Mayorek/ the truth about the card?
>
> A. Well, that's what I said, I have to support my mother and my woman with two children.
>
> Q. And that's why you said in the affidavit and that's why you said what you testified to today, is that correct? (Emphasis supplied.)
>
> A. Yes.

118/ Taylor also testified that subsequent to April 11 and 12, 1977, he observed "these things happening" on occasion.

the entire week of April 11, 1977, although he did appear at the Respondent's plant on Friday, April 15, 1977 to collect his paycheck. Cruz admitted that he himself never observed any violence on the picket line although he heard about it. 119/

Matilda Morales, an assembly line employee and yet another witness for the Respondent testified that on April 21, 1977 120/ she observed large numbers of people "all over the place" at the Respondent's premises, some wearing signs and some being employees of Conair. She stated that as she was leaving the premises on her way home, a group of men and women accosted her outside the plant and, "told me that if I continue working for Conair, they were going to burn down Conair and they were going to take my life with it and then they follow me to my house. . . . When they told me that, I became afraid. . . . They were throwing stones and they were saying bad things. . . ." Morales related that they also threatened to burn down the apartment house in which she was living at the time. 121/ She added that on May 13, 1977, "the apartment where I lived was burned down." 122/

Meanwhile, on April 12, 1977, Local 222 filed a petition for certification with the Board.

The Strike--What Occurred Thereafter

Mayorek continued that on either Thursday or Friday of the week of April 11, 1977, the first week of the strike, the Respondent posted three large signs, one each at the entrance to the front and rear parking areas, and one in front of the plant at the "flag pole area," 123/ which stated, in substance, that "Conair employees are not on strike." According

119/ Cruz' whole testimony concerning the above at times was unbelievable. He contradicted himself about the date these things happened, he hedged about reasons for collecting his salary from the Respondent, although he had not appeared for work the week the strike started, and his reason for accepting strike benefits is less than credible. A careful reading of the record makes his entire testimony suspect.

120/ It would appear from Morales' testimony that this incident may well have taken place on April 11 or 12, 1977 and not on April 21, 1977 as she alleged.

121/ In an affidavit dated May 10, 1977, given to a Board agent, Morales stated, "I never had any incidents with the picketing employees when I came and left work." In a prior affidavit given to the Respondent on April 25, 1977, Morales also stated that she was told by persons on the picket line around the plant not to go to work because Conair "was going to be blown up." However, in her affidavit to the Board she related that this conversation occurred "outside where I live in Perth Amboy," and that she was told this by "two men who are also employees of Conair" and who live in her building.

122/ Morales testified on cross-examination that the fire in the apartment building started in a different apartment than hers.

123/ These signs were "two to three feet high" and about "five foot wide."

to Mayorek the purpose of posting these signs was to "truthfully advise the public that there was no strike at Conair" even though admittedly 124/ the Respondent actually knew that a strike was in progress since April 11, 1977. Mayorek explained this seeming inconsistency by relating that the Respondent felt that "the feelings of the total population of the company, meaning the bargaining unit, had not been /represented/ by those people that had been out on strike." Mayorek added that these signs were removed by the Respondent after the strike ended. Arthur Marin testified that he observed signs at the Respondent's plant indicating that "Conair employees aren't on strike" when he first came to the plant for his employment interview sometime in May 1977.

Kampel, the Respondent's vice president for sales, testified that on or about April 12, 1977, 125/ at a meeting held either in the cafeteria or "on the floor of the factory" he "explained to the employees that Conair could not offer the wage package or anything else until the labor problems were resolved, "since the Respondent had been informed by its "legal counsel" that "such a move would be illegal." 126/ He stated that all the Respondent's employees were present, other than those out on strike and that Mayorek might have been present at the time. 127/ Kampel related that he also told the employees that they could continue to come to management with their problems and complaints as they had in the past. Kampel added that other management personnel were also "talking about the same thing" including Mayorek. Significantly, Kampel testified, "Again, as I stated before, being very unsophisticated when it came to any kind of labor relations, we /Respondent's management employees/ had found that we had made some promises that could not be kept. . . . As soon as there was legal counsel, and they found out that we had made a promise or did say something along those lines, and we did find out that they were not right to be said, we came back and we rectified the situation." It should be noted that Rizzuto, Mayorek, Raab and Kampel himself, among others of the Respondent's witnesses, denied vociferously the Respondent's making of any promises to its employees herein after the Union began its organizational campaign at Conair.

Concerning the above, Mariz Lopez, an assembly line employee, testified that in May 1977 she attended a meeting in the cafeteria at which Mayorek addressed the nonstriking employees telling them that the Respondent

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124/ Both Mayorek and Richard Escala, an assembly line supervisor, admitted that Conair management knew that there was a strike. Further this is also obvious from the testimony of all the Respondent's managerial and supervisory employees called as witnesses to testify herein, for example, see the testimony of Rizzuto, Kampel, Raab, Green, Gere, Cruz, etc.

125/ However Kampel admitted that the date could have been April 15, 1977 instead.

126/ Kampel stated that he told the employees "at least a hundred times" that the Respondent could not offer them a wage package "or anything else until after the troubles were over."

127/ Kampel indicated that there could have been about 150 employees at this meeting, and that Mayorek also told the employees that no wage offer could be made to them until everything was "settled."

could not legally grant them a salary increase at that time but that a wage increase would be granted as soon as the Respondent could do so. 128/ She added that also in May 1977, Mayorek spoke to approximately 10 employees in the cafeteria, at which time he asked the employees if they were satisfied with their work and did they have any problems.

The Strike--Further Alleged Misconduct by the Union

Raab related that on April 13, 1977, "Again there was a series of people outside the building, less in number than the two previous days. . . . Same basic type tactics, slashing of tires, rock throwing, bottles." 129/ While Raab indicated, "I can't pinpoint it right to the date or the time because of the time span," he testified that between April 13 and July 1, 1977 the following events occurred: "phone calls of bomb scares, where we had to clear the building;" a small fire in the men's room causing evacuation of the building; a serious fire in the stockroom located in the building's back area causing considerable damage and evacuation of the premises. 130/ Raab testified that neither he nor any of the other of the Respondent's management representatives had any idea who was responsible for these fires and that the Edison Fire Department after investigating the fires, which it classified as of a suspicious nature, failed to connect responsibility for any of them to the Respondent's employees or to Local 222. 131/

Mayorek also testified as to these events and others which occurred during the strike. He related that on April 13, 1977 there was a fire "in the back of the building near the railroad tracks; on April 14, 1977, there occurred a fire in the men's room in a wastebasket; on May 8, 1977 there was a fire in a garbage dumpster located in the plant's "loading dock area;" another fire occurred in "one of the garbage containers" on July 19, 1977; 132/ and during the

128/ Lopez, as stated previously, did not support Local 222, did not sign an authorization card and did not participate in the strike.

129/ While Raab testified on cross-examination that there was "substantial" bottle throwing and "a lot" of rock throwing, on April 13, 1977, his affidavit states that there was "minimal" rock throwing on that day. Raab admitted that after April 11 and 12, 1977, the strike became "quieter."

130/ Raab testified that while some employees required oxyen because of the heavy smoke, "nobody was seriously injured."

131/ However, albeit the Respondent "concedes that it cannot specifically identify the arsonists or the persons who participated in the arsons," it is clear from its brief and from the tenor of the testimony concerning these events which it proferred herein, that the Respondent seeks, inferentially, a finding of agency on the part of Local 222 in connection with these occurrences. Perhaps the only evidence herein upon which such an inference can be based is that nothing like this had ever happened at Conair before the appearance of Local 222 or Teamster Local 102 on the scene.

132/ In a police report pertaining to one of the fires at the Respondent's premises there appears a statement by John Mayorek made to the reporting police officer as follows: "He /Mayorek/ stated that he will check the employees list and find out who had been sympathizing with the picketers and supply me with their names." See Charging Party's Exhibit 7.

night of April 27, 1977 several large windows in the reception and office areas of the Respondent's plant were "blown out" by shotgun blasts which also damaged the furniture and walls in Mayorek's office, this having occurred during the late evening or early morning when the plant was empty. 133/ Mayorek conceded in his testimony that it was equally probable that the fires and the shotgunning could have been perpetrated by representatives of Local 222 or Teamsters Local 102 or by persons having no connection with either union.

Concerning the fires, Arthur Taylor testified that over the period of the strike there were "four or five" fires at the Conair plant and that "I personally fought the fire and I almost got killed doing it and I almost saw the plant go down because of the fire." He added that he had also chased a car "when they threw some sort of flammable objet into the dumpster and then ran off." 134/

Further, in evidence are a series of photographs proffered by the Respondent depicting groups of people on the picket line, strikers stopping trucks, as well as broken windshields and car windows and flattened tires on motor vehicles. Some of the photo's show fires at the Conair plant and resulting damage to the Respondent's property. According to Arthur Taylor, these photographs were taken by him on April 11-17 and July 18 and 19, 1977.

Additionally, Paul Sukovitch, hired by the Respondent on May 31, 1977 as an assembly line worker, testified that on or about July 18 or 19, 1977, he observed "strikers" throwing stones and that on three separate occasions the headlights of his car were broken. Sukovitch added that each morning as he drove his car onto the Respondent's property the pickets would "jump in front of the car and telling me I was crossing a legal picket line. They told me if I was to keep going to work that more things would be happening."

Rosa Cruz, as indicated hereinbefore testified that she was harassed and threatened each day as she passed through the picket line to enter the Conair plant and that this occurred throughout the strike. Anthony Schirripa testified that throughout the entire strike, rocks, bottles and debris were thrown at his truck when he left and entered the plant.

Mayorek testified that the Respondent obtained an injunction against the picketing on April 13, 1977, which was vacated on May 16, 1977. He stated that the Respondent obtained a second injunction on July 21, 1977 which continued in force until the end of the strike on September 23, 1977.

133/ However, as with the fires, the Respondent admitted that it could offer no positive proof as to who was responsible for the shotgun attack on the Respondent's premises although "it sought the inference found that this attack was part of Local 222's pattern of violence allegedly engaged in during the course of the strike." As set forth in its brief the Respondent asserts, "While there is no evidence to directly link this event to the Union, nothing similar had happened prior to the Union organization."

134/ However, Taylor could not identify any of the occupants of the car nor did he know who had started the fires.

The Videotapes 135/

Interestingly, on the first day of the hearing, Counsel for the Respondent indicated that there were videotapes of the picket line misconduct and these tapes would be introduced into evidence subsequently. Much later on in the hearing, he stated that the Respondent would not offer the videotapes to which reference had been made throughout the hearing because "everything of a material nature that appears on the videotapes has already been testified to in one form or another by the various individual witnesses which have been produced." Counsel for the General Counsel then subpoenaed all the videotapes, 12 in number, and offered them into evidence. They are marked as General Counsel's Exhibit 101(a)-101(l) correspondingly in the same consecutive order as above.

Additionally Mayorek testified that Linda Murray, his secretary, had numbered the videotapes at his request and that she had inadvertently assumed that the first tape made was the second and so numbered it accordingly because it was dated April 13 and 14, 1977 and the strike had commenced on April 11, 1977. However, Murray testified that she never performed any clerical functions in connection with these tapes except to photocopy certain logs describing the events contained on the videotapes pursuant to Mayorek's request.

John Mayorek testified that videotape recordings had been taken of the pickets and their conduct on the picket line beginning "from about April 13th--maybe even the late afternoon of April 12th--right through up until present." 136/ Mayorek continued that various of the Respondent's employees

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135/ The videotapes consist of 12 reels enclosed in jackets numbered consecutively by the Respondent with the dates of the events which are recorded on each reel as follows:

Tape # 2 - April 13 and 14, 1977
Tape # 3 - April 15 and 18-20, 1977
Tape # 4 - April 21-25, 1977
Tape # 5 - May 12-18, 1977
Tape # 6 - May 23-26, 1977
Tape # 8 - July 18-20, 1977
Tape # (unnumbered) July 20 and 21, 1977
Tape # 9 - July 22, 1977
Tape #10 - August 1-24, 1977
Tape #11 - September 8, 1977
Tape #12 - September 8-22, 1977

136/ Mayorek also testified that the video equipment might have been rented on April 13, 1977 but the actual taping, "for the argument's sake, started on the 14th." It should be noted that when Mayorek was reminded of his previous testimony concerning the April 12 or 13, 1977 date, he denied that the tapings commenced on April 12th and alleged that the videotape equipment was rented on April 13th. However, the rental invoice was never produced by the Respondent, even though Linda Murray, Mayorek's secretary, one of the employees who had picked up the video equipment testified that the invoice was in the Respondent's possession and locatable. Murray also testified that the videotaping commenced on or about April 18, 1977, "about a week or so" after the strike started on April 11, 1977 but then acknowledged that it could have started sooner than that.

operated the videotape equipment during the course of the strike and prepared detailed logs of the incidents recorded. 137/ He stated that the video equipment was turned on at 6:30-6:45 a.m. and "several weeks films were taken of the actual pickets out there . . . in the morning for the most part." Mayorek related,

> I remember telling the guys that when the people came into the plant to make sure that they take some pictures of the cars entering and the pickets there for nothing other than just showing that, you know, the time people coming in.
>
> Then I just told them to stand there to have it available; if there were any incidents to record the incidents. They didn't have it on constantly.

Mayorek added that none of the misconduct alleged by the Respondent was recorded on the videotapes. 138/

John Raab testified that Mayorek was in charge of the videotape equipment and that he, Raab, had no knowledge as to when the tape recordings were commenced or how many hours of videotape were taken, and that as far as he knew the employees who operated the equipment were competent in its use. Richard Escala testified that he noticed the videotape equipment in use during the first week of the strike and that it was set up throughout the length of the strike.

The videotapes were viewed by myself and counsel for the various parties herein from beginning to end on three separate days during the course of the hearing. After again viewing the videotapes in evidence as part of the record herein, I find that they show in substance, scenes of varying numbers of pickets moving about near the Respondent's plant with automobiles parked along the adjacent streets, 139/ police and/or fire department personnel, vehicles and equipment present at the plant site, 140/ children among the adult pickets on the

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137/ These included security guard Thom Thomas , import manager Arthur Taylor, cost accountant Irving Rosen, Otto Escander, Russell Eichen (a college student employed for the summer period), and Mayorek himself.

138/ By way of explanation thereof Mayorek testified that those employees who operated the videotape equipment had other "functions" with the company and other jobs to perform besides this and that at times he himself found the equipment unmanned although he had asked them to "please man the camera as much as they possibly can do it." However neither Taylor nor Rosen, who were called as witnesses, nor Escander and Eichen, who were not, gave any testimony concerning this.

139/ General Counsel's Exhibits 101(a-l)

140/ See for example, General Counsel's Exhibits 101 (a, c, h, l).

picket lines, 141/ a security or private guard with a dog 142/ and scenes of automobiles driven by the Respondent's employees entering and leaving the Conair plant and pickets in conversation with truck drivers after which the trucks are either driven onto the Respondent's property or away from the plant. 143/

Further, these videotapes reveal that the picketing was accomplished in a generally peaceful manner for the periods of time recorded thereon. I observed no instances of the pickets throwing rocks, bottles, eggs, or other objects at persons, cars or trucks entering or leaving the Conair plant and except for the incident involving a truck driver named Frank Wahler, discussed in detail hereinafter, 144/ show no instances of damage or attempts to damage any of the Respondent's property, its vehicles or that belonging to anyone else, or assaults upon people. 145/ In fact the videotapes mostly show scenes of peaceful picketing by supporters of Local 222, with automobiles driven by the Respondent's employees entering and leaving the Conair plant without interference and truck drivers either crossing or refusing to cross the picket line after peaceful conversation with one or more of the pickets. As shown by the tapes, on many days during the strike, while automobiles and trucks entered and left the Respondent's plant, the pickets sat in the grass near the Respondent's driveways and did not even patrol in front of them. On occasion the tapes reflect an almost carnival or picnic atmosphere at the picketing site with on one occasion pickets playing ball on a vacant lot near the plant.

Additionally, as indicated before and with some significance, Mayorek admitted:

141/ See for example, General Counsel's Exhibits 101 (d, e, g, i, j, l). In one scene there is a baby carriage near the pickets. It should be noted that the Respondent in its brief states, "the obvious purpose for the presence of the children was to prevent entrance to and exit from the Conair facility. I do not agree. While not wholly discounting this purpose, it is just as reasonable to suppose that the children were present because their parents were there, having no place to leave them or no babysitters and could just as well support the inference of peaceful picketing since it is hard to imagine parents placing their children in a dangerous or hostile situation if violence was forseeably projected or contemplated. Further there are no viewable instances on the videotapes of either the children or baby carriages being used for the purposes alleged by the Respondent.

142/ General Counsel's Exhibit 101(b).

143/ General Counsel's Exhibits 101(a-l).

144/ Aside from the Wahler incident the videotapes are devoid of any instances of violence on the part of the picketers. Further, the General Counsel in its brief maintains that, "the videotapes do not contain a single incident of picket line misconduct which would even arguably violate Section 8(b)(1)(A) of the Act," asserting that the Wahler incident on the evening of July 21, 1977 was provoked by a nonemployee Wahler sometime after the Respondent's unit employees had left the plant.

145/ However I did observe that on occasion pickets carried wooden "2x4" sticks in their hands on the picket line.

> I recently reviewed the tapes and I could testify now after recently reviewing them, these past couple of days, that every incident that I testified to of violence is not on those tapes. . . . I can testify not every act of violence that I previously testified to is on those tapes.

Despite Mayorek's explanation for these omissions, and despite the testimony given by several of the Respondent's witnesses as to constant acts of violence and intimidation committed by the pickets against those employees, and their property, who failed or refused to join the strike as well as against the Respondent and its management representatives, I find the lack of such scenes in the videotape after the first 2 days of the strike (April 11 and 12, 1977) singularly revealing. 146/

Incidents Involving Prince Alfred

Prince Alfred, a/k/a Akinola Omoshola, employed by the Respondent in its shipping and receiving department, testified extensively concerning various alleged incidents which occurred in and around the picket line from July 15 to July 18, 1977. 147/ Alfred related that soon after he started working for the Respondent, he realized that there was a strike in progress observing pickets at

146/ See for example the testimony of Raab, Rosa Cruz, Bourbakis, Mayorek, etc. Furthermore, Raab admitted that of the employees who worked during the strike, no one was injured in any way except for the two employee passengers on the minibus and Josephine Torres as hereinbefore described. Richard Escala testified that after "the court issued an injunction" during the first week of the strike, the number of pickets on the picket line was substantially reduced, there was no more of the "type of picketing" that occurred on the first 2 days, that there was no more blocking of traffic or throwing stones or yelling or things of that nature, and that except for "a couple of incidents" in July, 1977, the picketing quieted down, the pickets were few in number and people came and went without incident until the end of the strike. Assembly line employee Cecelia Beato, a witness for the Respondent, testified that she had worked throughout the strike and that she never noticed any of the people on the picket line doing anything unusual. Jose Cruz, another of the Respondent's witnesses, testified, as indicated before, that he himself had never seen any violence on the picket line "but some people say they saw and they told me." Further, Vice President Jerry Kampel testified that he saw no one stopped from entering the Conair plant in June or July 1977 and that there were periods during the strike when no pickets were present at the Respondent's premises at all.

147/ Alfred, "a crown prince" of Nigeria, was hired by the Respondent sometime in late May 1977. The Respondent, in its "Conair Newsletter" distributed to employees, made Alfred the subject of an article in which it asserted that he had come to work for the Respondent in order to "develop some acquaintanceship with U.S. business practices" and that "he is a strong advocate of Conair's establishing a selling post in Nigeria since in his opinion, Conair products are vastly superior to European Imports." See Charging Party's Exhibit 5.

the Conair plant. He stated that "around the 16th of July," 1977 148/ while returning to the plant after lunch his car was stopped at the entranceway to the plant by "some pickets, you know--people with placards, 'Corporation closed down,' 'No job,' 'Don't come in,' 'Be careful,' 'Save your life,'" who told him, "No, you can't come in." 149/ Alfred testified that Olah, who was among the group of pickets, then said to him, "If you love yourself, turn back right here," and after ascertaining that Alfred was a "foreigner" additionally told Alfred that if he wanted to return safely to his country then he should "turn back." He added that after he refused this request, Olah placed a piece of wood with nails in it at the back wheels of his car. 150/ Alfred continued that "a fat man with blonde hair" pulled at the door of his car and when he decided to drive ahead the pickets placed a "baby trolley with a baby inside" in front of his car. According to Alfred he then left the car to seek the safety of the plant leaving the door open and his car keys in the ignition with the motor running; that Olah then slammed the car door shut whereupon Alfred returned to his car; that he could still not proceed forward because the pickets surrounded the car; that after the pickets finally told Alfred that he could move his car "forward," he picked up the piece of wood with the nails in it so as not to drive over it and puncture his tires. 151/ Alfred also testified that while he was driving onto the Respondent's parking lot the pickets also threw rocks at his car.

Alfred testified that prior to the above incident and "after 5 o'clock" on July 16, 1977, 152/ while driving home after work, he stopped to offer a ride to "a guy . . . by Middlesex College" who had waved at him to stop his car. 153/ He stated that Olah now appeared and told him, "We like you. We don't

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148/ In an affidavit given to the Respondent dated July 18, 1977, Alfred stated that this incident occurred on that date, July 18, 1977. Alfred also corrected his testimony concerning this date when the Respondent's counsel Burstein asked him whether this happened on July 16 or July 18, 1977.

149/ Alfred stated that, "thirty-five to fifty people surrounded the car."

150/ The Respondent had marked for identification, a piece of wood with a nail imbedded in one end and a screw in the other end which Alfred identified as being the piece of wood he retrieved after this incident happened and which he gave to the Respondent upon his subsequent entry into the plant.

151/ There are discrepancies in Alfred's account of this occurrence in that he first indicated that the piece of wood was placed at the rear of his car, then he stated it was put in front of the car. He testified that he picked the piece of wood up so that he would not have to drive over it and court a flat tire, but in his affidavit given to the Respondent concerning this incident he stated that he had actually driven over the wood.

152/ While Alfred at first testified with certainty that this incident had occurred on a Saturday, July 16, 1977, during cross-examination he acknowledged that he was unsure whether the incident actually happened on a Saturday and upon his recall as a witness by the Respondent he testified that it happened on a Friday.

153/ On cross-examination Alfred testified that "two people" had waved his car to a stop and that he had seen these two passengers on the picket line at Conair on many occasions stopping him from entering the plant, "I had

(continued)

want you to have any problem. We work for this union, and the union will benefit you, if you ever behave yourself." Alfred continued that a "fat guy with blond hair--came out with a check with the union," and told him, "We take care of you. If you need money, we'll give you money." 154/ According to Alfred the "fellow who was fat" offered him $50,000 which Olah explained would be in payment for Alfred opening the back door to the Respondent's premises in order to allow them to gain entry into the plant. Alfred added that he refused the offer and subsequently told Mayorek about this incident, Mayorek advising him not to "worry about anything."

Mayorek testified that Alfred did tell him about an offer of "money or a check" as a bribe to "let people into the plant," but that Alfred had not mentioned the amount proposed. Mayorek stated that he didn't consider this significant at the time because "There had been other bribes too offered to people" and he "didn't follow up on it." 155/

Alfred continued that also prior to July 16, 1977 his car had been stopped and surrounded at the entranceway to the Conair plant by Olah and several "big men . . . with a big machete in the hand," preventing him from entering the parking lot, at which time he was warned that if he drove his car onto the Respondent's property "something would happen" and then Olah "drew out a machete" and threatened to cut his head. 156/ Alfred testified that on this occasion he then left his automobile and entered the plant to seek assistance, and upon his return to his car found that the rear tires were flat.

Stehen Olah, called as a rebuttal witness by the General Counsel denied both the conversations with Alfred and the happening of any of the incidents set forth above. Further, the General Counsel proffered the testimony of Joseph O'Keefe, 157/ (the most likely person, according to the General Counsel, who

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153/ trouble with them before. . . ." According to Alfred he stopped to pick them up in spite of this because at first he could not recognize them from a distance and when he came close enough to do so heavy traffic precluded him from driving away. He added that there were policemen directing traffic nearby and he therefore felt secure.

154/ Alfred testified that this individual spoke with a thick Spanish accent.

155/ However the alleged offer of a bribe to Alfred was the only instance upon which the Respondent offered testimony by a participant thereto.

156/ Alfred testified that this was not the first time he had been threatened like this, that it happened many times and "to many people." Again no other witnesses called by the Respondent testified to being threatened by pickets wielding machetes. Further none of the instances of rock throwing and other harassment which Alfred alleged was constantly perpetrated against him appears in the videotapes hereinbefore discussed.

157/ O'Keefe, a Local 222 representative involved in the Union's organizational campaign at Conair, was called as a rebuttal witness by the General Counsel. O'Keefe had been in the hearing room during the presentation of the General Counsel's case but not during the Respondent's case. Since the General (continued)

could be involved in the incidents related above by Alfred, who stated that he did not know Alfred), had never offered him or any other employee of the Respondent money or a check in order to gain entry into the Conair plant. O'Keefe further testified there was no one employed by the Union who fit Alfred's description of the person who offered him the bribe, nor did Alfred's description watch O'Keefe's appearance. 158/

In carefully reviewing Alfred's testimony I found inconsistencies, equivocation and contradiction abounding therein. He testified extensively about his attendance at Rutgers University as a student and, although not as lengthy, about his prior employment and separation therefrom at Revlon, all of which reinforces my doubt as to the veracity of his testimony.

Alfred testified that he was an evening student at Rutgers University at the campus at New Brunswick, New Jersey, enrolled, since 1976, in the PH.D. graduate program of the Rutgers University School of Criminal Justice. He stated that during the period the events he testified about took place, the summer of 1977, he was attending the university six evenings per week taking undergraduate courses, and that his overall grade point average at Rutgers was 2.818. Alfred added that when he enrolled in the School of Criminal Justice Ph.D. program he did not take a "graduate record examination," and had to take the undergraduate courses as a prerequisite to obtaining his Ph.D.

The General Counsel called as its witness Albert Record, Assistant Dean of the Rutgers University School of Criminal Justice, who testified that Alfred's student record transcript shows that he is an undergraduate non-matriculating night division student at Rutgers University enrolled in the department of criminal justice; that Alfred is not a candidate for a Ph.D. in the School of Criminal Justice and does not have the necessary minimum grade average to so qualify. Dean Record also testified that "a graduate record examination" is a prerequisite for enrollment in the PH.D. program in criminal justice at Rutgers University. 159/

Alfred testified that he had worked for Revlon prior to his employment with the Respondent and that "I quit from Revlon" after having a problem "with the supervisor." He stated that he advised District 65, the union at Revlon

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157/ Counsel represented that O'Keefe was being called at the time to rebut specific allegations made against him during the Respondent's case, I granted the General Counsel's application to allow him to testify over the Respondent's objections although he was technically in violation of the sequestration order effective at the hearing.

158/ O'Keefe testified that he was born in Argentia, Newfoundland and although he does speak with a noticeable Irish brogue, it is unlike a Spanish accent. Further O'Keefe has gray hair, a red oval face, is 5 feet 7 inches tall and weighs 180 pounds.

159/ The Respondent itself offered evidence that Alfred was accepted at American International Open University in a doctoral program in criminal justice beginning May 15, 1978. See the Respondent's Exhibit 75. American International Open University has no connection with Rutgers University.

about this and the evidence herein shows that the matter subsequently was sent to arbitration. According to Alfred he had been given a pass to remove "scrap paper, folders, boxes, empty boxes," from the plant and had gone to the supervisor to obtain additional permission to take "some broken garbage" as well. However when he entered the supervisor's office, he found the supervisor otherwise disposed, with a girl on his lap and Alfred exited leaving the above material returning later to pick it up. Alfred continued that on his way out he was stopped by the security guard who checked the boxes and discovered that the box of "broken garbage" contained altogether something else, and called the supervisor who then denied giving Alfred permission to take this material out of the plant. Alfred added that he then "cursed out" the supervisor, leading to a charge against him of insubordination by the Company.

Suffice it to say that the impartial arbitrator's award 160/ shows that the carton Alfred was carrying out of the Revlon plant not only contained "the worn looseleaf binder and a few yards of scrap plastic but a small black sponge and underneath a piece of cardboard that neatly covered the entire bottom of the carton and formed a 'false bottom' /containing/ the following assortment of Company property: an orange plastic case, a box of carbon paper, 6 metal baskets, a small wooden basket, an Ultima set containing 5 pieces and 6 sets of eye shadow each set containing 40 separate shades for a total of 240 pieces." 161/ After discounting Alfred's explanation that he did not know these items were in the carton (since Alfred claimed to have exchanged the carton containing the binder and the scrap plastic for the carton containing the Company's property because the first carton was "leaking powder"), the arbitrator, John M. Malkin, states:

> Unfortunately, most of Grievant's testimony was just not believable. The Ultima and 6 sets of eye shadow alone weighed 10 pounds and could not have been overlooked when Grievant first picked up the carton. The "false bottom" was several inches higher than the bottom of the carton and it too could not have been overlooked by Grievant.
>
> The Company had made sure that the rule against unauthorized possession of Company property was known by every employee . . . /As/a dischargeable offense.
>
> The Union put forth a strong defense in an effort to save Grievant's job for him but the facts must speak for themselves.
>
> I am constrained by the credible testimony in the case to find that Grievant was improperly and without authority in possession of Company property including Company products and that Grievant's misconduct constituted just cause for his discharge by the Company.

160/ See Charging Party's Exhibit 6; Award of Arbitration dated May 16, 1977.
161/ Significantly, while testifying herein, Alfred had denied that these items were in the box he was carrying out of the plant.

Incidents Involving Nathaniel Johnson

Nathaniel Johnson, a private, independent truckman who performs trucking services "exclusively for the Accurate Box Company, Newark, New Jersey," 162/ testified that in April 1977 he had driven to the Conair plant to make a delivery where he observed "people parading outside with signs that said they were on strike." Johnson stated that he also saw a sign on the Respondent's property that said that the Respondent was not on strike and he therefore "drove his truck in." He continued that obscenities were shouted at him and "rocks hurled at my truck" by the pickets. Johnson added that his truck sustained no damage and he was able to make his delivery.

Johnson related that during the month of April 1977 his trucks had occasion to make deliveries to the Respondent's plant "four or maybe five" times a week and he personally drove a truck to the Respondent's plant "maybe once a week or every other week but I always encountered some sort of problem, either myself or my trucks." He continued, "Well, my next problem that I encountered was in July when a woman on the picket line threw a handful of pebbles through my window, open window," one of the stones striking Johnson in the face. 163/

Johnson testified that between April 1977 and July 1977 whenever he personally drove his truck to the plant he would always find people blocking the driveway and would always be threatened and called names, stating, "Well, they say you black son of a bitch, I'm going to get you when you get out, and we'll be waiting for you, and you're going to get yours, and things like that." 164/ He continued that during this same period he had come to the Conair

162/ Johnson testified that he owns his truck and three others and employs two other drivers besides himself. He also testified that the Respondent is one of the "largest" customers of Accurate Box Company, one of its "Top Two."

163/ Johnson stated that when he entered the Respondent's plant and reported what had happened, he was directed to see Mayorek at which time he provided the Respondent with a written statement of the incident.

164/ Johnson testified, "On one occasion, as I left the plant, they were waiting for me up the road, and I took the back way, I thought that I would escape, you know, but /lucky/ for me a police car anticipated trouble and he was waiting at the intersection, and then no one bothered me." He added that there were "about three of them in the car and one man was standing outside the car," and that he had previously seen these people on the picket line at the Conair plant. He stated that every time he went to the Respondent's plant he had them call the police before he left the plant. His testimony on cross-examination concerning this incident is enlightening:

> A. Well, due to the fact that I had to have a police come, should indicate that the people were there. They were always out there on the road. So to say they weren't waiting for me on the road, it would be a misstatement.
> Q. Mr. Johnson, you've testified that they were waiting for you up the road, specifically for you.
> A. Yes.

(continued)

plant approximately five times per month, and that in April, May and June 1977, rocks had been thrown at his truck, hitting it. 165/

However, Johnson also acknowledged that he had given an affidavit to a Board agent dated August 1, 1977 and that nowhere in the affidavit does he relate any incidents happening to him at the Respondent's plant prior to the one on July 20, 1977, when a picket threw pebbles or rocks into the open window of his truck, hitting him on the cheek. 166/ While Johnson attempted to explain this by

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164/ Q. Why do you say that?
A. Because they said they were going to get me and they were there in the cars at all times.
Q. You didn't actually see a group of people waiting to ambush you on the road, did you?
A. They were parading in front of my truck, hurling names and stones at me and saying they were going to get me, would you assume somebody is going to wait for you, if they were-- if they did those things and they're all in cars driving in and out, up and down the road?
Q. So it was your belief that someone was going to be waiting for you up the road?
A. They made me believe it.
Q. But no one was actually waiting for you that you know of?
A. Sure they were there.
I saw the same people as I left with my truck.

165/ Mayorek testified that "to the best of my knowledge" every time Johnson entered or left the Respondent's plant in April, May, June, July, August and September of 1977, there were rocks and bottles thrown at his truck and he was threatened and harassed.

166/ Again Johnson's testimony on cross-examination is revealing. In testifying about the affidavit given to Board Attorney Robert A. Weisen he related:
Q. Did you know why you were talking to Mr. Weisen?
A. Yes.
Q. What the purpose was?
A. Yes.
Q. And what was that?
A. He wanted a statement from me referring to the incidents that I had because of the labor problems at Conair.
Q. So you were going to tell him about the incidents that had occurred, things that you had experienced while you were delivering things to Conair?
A. Yes.

As set forth above Johnson admitted that his affidavit makes no mention of any incidents occurring prior to July 20, 1977. He also testified on cross-examination, in contradiction to his prior testimony, that the incidents wherein rocks were thrown at his truck while it was being unloaded, which Johnson previously testified to as having happened in April 1977, and the

(continued)

stating that he was unsure if Weisen had written down everything Johnson told him or if Weisen had asked him about any incidents occurring other than the ones on July 20, 1977, his testimony, parts of which have been set forth herein, cast doubt upon this explanation.

It should also be noted that the videotapes show no instances of interference with the ingress or egress of Accurate Box Company trucks nor incidents of rock throwing, bottle throwing, or pickets gesturing involving Accurate trucks or those of any other company entering or leaving the plant area. 167/

The Frank Wahler Incident

According to the Respondent, "While the record is replete with examples of the Union's consistent policy of coercion, the best example of the Union's approach was presented in the incident which involved Frank Wahler." That the incident involving Wahler happened on July 21, 1977 at approximately 7:15 p.m., occurred outside the Respondent's plant, involved Wahler, a truck driver and union shop steward for the Roadway Express Company and certain representatives of Local 222 168/ is undisputed. However what actually occurred during this incident is contested as evidenced by the divergent testimony given by the Respondent's witnesses as contrasted with that given by witnesses for the General Counsel. The Respondent contends that Wahler was the victim of an unprovoked attack by representatives of Local 222, while the General Counsel contends that the incident was provoked by Wahler himself, Wahler not being an employee of the Respondent, and happened after the Respondent's employees had gone home after the close of the workday and the pickets had left the Conair site.

166/ incident involving pebbles or rocks being thrown through his truck window, both happened on the same day, July 20, 1977.

167/ General Counsel's Exhibit 101(h), reflecting events occurring on July 20 and 21, 1977 show Accurate Box Company trucks entering and leaving the Respondent's premises without incident or interference of any kind.

168/ Joseph O'Keefe, a Local 222 representative, testified that present at the time this incident occurred were, "myself, Stephen Olah, Miguel Gonzalez, Julio Jokeen, Rafael Rivera and Cisto Robles." As indicated previously O'Keefe's testimony on rebuttal was challenged by the Respondent on the ground that he had been present in the hearing room while various witnesses were testifying during the presentation of the General Counsel's direct case and therefore O'Keefe was "technically" in violation of a sequestration order in effect during the course of this proceeding. I overruled the Respondent's objection and allowed O'Keefe to testify for the reasons that: O'Keefe was not present during the Respondent's presentation of its case and the need to call him as a witness only arose after the Respondent had introduced evidence concerning O'Keefe which gave rise to the necessity for his rebuttal testimony; and it was obvious at the time this arose, as it more clearly appears now, after a review of the record herein, that by strictly confining O'Keefe's testimony to such rebuttal subject matter the danger of O'Keefe "coloring" his testimony in a manner contradictory to the truth and detrimental to the Respondent because of his having overheard the testimony of the General Counsel's witnesses, would be nil.

Preliminarily, Mayorek testified that on July 20, 1977, as he was leaving the Respondent's premises in his car, he observed, "over 100 people" outside the Respondent's plant and "the crowd had a Roadway truck stopped that was going into the parking lot." 169/ He stated that he turned and "went up the road to where the truck was stopped, in the middle of the road" and saw two police cars nearby, with the truckdriver sitting in the cab of his truck crying. Mayorek continued that the driver told him, "They're going to kill me, I am not going to go in." He added that with police assistance, the truck was driven onto the Respondent's property with Mayorek following in his car, and that both the truck and car were then "bombarded with rocks."

Francis /Frank/ Wahler testified that on July 21, 1977, at approximately 7:15 p.m., he arrived at the Respondent's plant in his pickup truck whereupon, "I put my truck on the right side of the street, 170/ there was a group of people across the street, and they approached my truck . . . and this group of people started shouting all kinds of slurs at me, 171/ at which time I got out of the truck and I told them to get away from my truck and leave me alone." 172/

169/ The Respondent uses the trucking services of the Roadway Express Company and therefore it is not unusual for Roadway trucks to appear at the Conair plant.

170/ Wahler testified on cross-examination that when he arrived at Conair, he parked his truck "more or less" opposite to the "group of people," six or seven in number, who were standing around an automobile parked on the left side of the street, parking between "two other cars parked there," although his truck extended "about three or four feet from the curb." Interestingly, the videotape taken of the incident by Mayorek (General Counsel's Exhibit 101(h)), shows Wahler's truck parked in the middle of the street or roadway with no parked cars about or near it. Furthermore, Ronald Matalaveg, the Roadway Express Company's terminal manager, who subsequently arrived on the scene in a Roadway truck, testified that Wahler's truck was parked in the middle of the street and that it was blocking traffic. However, O'Keefe testified his car was parked in the area of Conair, as were the automobiles of Stephen Olah and Rafael Rivera. Additionally, while Wahler testified that he came to the Respondent's plant to observe the treatment of the driver of a Roadway Express Company truck scheduled to appear at the Respondent's premises that evening and that he could just as well have made his observations from any point further up or down the roadway without encountering any problems, he admitted deliberately choosing to park his truck "more or less opposite to where these individuals were around the car."

171/ The words allegedly used as "slurs" as repeated by Wahler in his testimony, were obscenities of a particularly insulting and derogatory nature, such as "Roadway motherfucker," and "cocksucker."

172/ Wahler initially testified on cross-examination that while he tried to explain to these people why he was there "they didn't give me a chance to explain anything." He then testified that he might have told the group of people surrounding his truck that they had "assaulted one of my drivers yesterday," and that while saying this, he might have raised his voice

(continued)

Wahler continued that an argument ensued 173/ and, "When I was arguing with the people . . . I heard some--the air coming out of my tire and I pointed to them, and I said, what did you do that for, and one of the men, he said, boy, you were lucky you didn't get it there, pointing across my stomach." Wahler stated that while he did not see and therefore could not identify the object which was used to puncture the tire, he saw it subsequently placed under the hood of a car parked in the vicinity. 174/ Wahler testified that he became angry because the punctured tire was a new one and that the emotions of all the people there, including his own, " were riled up at this point."

Wahler related that while they were ". . . still arguing, another man came up with a bumper jack and struck me across the left leg with it. . . . Well, then everyone started--the people from Conair came running out and the Roadway truck pulled up, and then the Edison police came up." Wahler continued, "Well, everyone was shouting at everyone and meanwhile I was being pushed from the back, another guy took another swing at me again, and he missed, he didn't hit me. I was trying to back off somewhere, looking for a safe place to go--I was arguing about my tire, and everything." He stated that he told the police what had transpired and filed a charge which resulted in an "Edison court" action in which the defendants, "they pleaded guilty, I believe."

Wahler testified that he remained at the Respondent's plant until after 11:00 p.m. while his tire was being repaired and during this time he observed "this group of people was riding up and down the street and parking across the street, and the Edison police came and they had confronted each other. Consequently I did get some police to remove them." Further, Wahler related that while he ordinarily did not go to the Respondent's plant at 7:15 in the evening, he had done so on July 21, 1977 because of the previous day's incident involving a Roadway Express Company truck driver and the pickets, as mentioned before, and the fact that another Roadway truck was due to appear at Conair that very evening, although he did not know at what time, and he wanted, "to see how the driver was being treated at the plant," and whether the truck could enter the Respondent's premises without any difficulty. 175/

172/ because he was "a little bit agitated" at the time, and concerned about his personal safety even though he did leave his truck to face the group of people surrounding it. Further, concerning his recognition by the Union representatives as being a Roadway Express Company employee, Wahler stated,

> "Perhaps someone recognized me, but I didn't have a decal on the back of my pickup truck, like a parking decal, it says Roadway on the back of it."

173/ Wahler testified that when he got out of his truck he "was having a loud argument" with a "grey/white haired gentleman." It was undisputed that this individual was Joseph O'Keefe, a Union representative.

174/ As set forth in General Counsel's brief, "It is undisputed that the front left tire of Wahler's pick-up truck was punctured." (General Counsel's Exhibit No. 101(h).)

175/ In spite of this response, when Wahler was asked on cross-examination as to the reason why he had gone to the Respondent's plant at 7:15 that evening after admittedly knowing that the Roadway Express Company was now sending

(continued)

Additionally Wahler testified that that particular evening he had cashed his paycheck and placed the money under the seat of the cab of his truck. 176/ He related that while the group of men were gathered about his truck arguing with him and placing their hands on the door, he told them to get away from the truck, then he reached under the seat, retrieved his pay envelope, placed it in his pocket and opened the door of his truck cab and dismounted at which time the group of people surrounding the truck moved back. Wahler continued that after he was struck by the man with a jack, several people wearing suits came running out of the Conair plant and escorted him "over towards the driveway on to Conair property." Wahler at first testified that he had not informed anyone at Conair that he was coming to the plant that evening. However he then changed his testimony and stated that he had telephoned someone at Conair prior to his "coming down there," but could not identify who it was he spoke to. 177/ Additionally Wahler indicated that this incident occurred "supposedly" after the Conair plant was closed for the day.

Mayorek testified that on July 21, 1977 at approximately 6:45 p.m. while in his office, he heard someone shouting to "open the front door" and when he "hobbled" 178/ outside the building to investigate he saw "six, seven, eight people just mingling around the pick-up truck." He stated that he then reentered the plant, "hollering" to other persons therein to proceed outside the building while he manned the video camera to record the incident. Mayorek recounted the following which he viewed on the video camera's screen:

175/ its trucks to Conair in the evenings after the pickets had left for the day to avoid any problems, and after he learned that a Roadway truck was scheduled to appear at the plant, he responded, "I did turn around and go over there, I don't know the reason why, but I went over there." Wahler also testified that he had told the Roadway Express Company terminal manager that very morning not to send any trucks to the Conair plant anymore because of the incident with one of its trucks the previous day. However, although Ronald Matalaveg, the terminal manager, did testify, he failed to corroborate this.

176/ Wahler stated that this incident occurred on a Thursday and that payday for the Roadway Express Company was Friday. However he stated that if the checks are available on Thursday he cashes it on that day and he "thinks" that that week his paycheck was obtainable on a Thursday.

177/ There are many inconsistencies in Wahler's overall testimony, in addition to the above, i.e., Wahler testified initially that his truck had no Roadway decal on it but still Union representatives involved with him in this incident somehow knew he was a Roadway Express Company employee. On cross-examination he testified that there was a "little" Roadway decal on the rear bumper, etc. Also note the character of his testimony concerning his paycheck and the money allegedly placed under the truck cab seat and that concerning the reasons or lack thereof for being at the Conair plant that evening.

178/ Mayorek testified that at the time he had a broken leg, unrelated to and not acquired in any of the incidents set forth herein.

> I saw the guy--Frank Wahler, outside of his pick-up truck, right outside the door section, I saw six or seven pickets, you know, very close to him, mettle around this truck, then I saw a guy puncture his tire clearly in the screen. . . . Then I saw Wahler walk towards the guy and the guy walk away towards the cars that had been parked on the side of the road, and he was looking at his tire. I then saw him walk towards the guy and another guy come into the picture . . . from the left-hand side, waving at the time--it was a large long object, a slender object and just hall it off in the back of him and then strike Frank Wahler--it appeared to me to be on the --upper part of the leg.

Mayorek continued that, "some of our employees came into the picture and then I saw the pickets disappear in different directions." According to Mayorek, one of the Respondent's trucks next appeared dividing the picketers from the Respondent's employees and after the truck moved out of the picture he saw Wahler pushed from behind by one of the Union's representatives. 179/

Mayorek added that a large Roadway Express Company truck now arrived on the scene and when the Roadway terminal manager emerged from the truck, "the pickets started to argue with him." Mayorek continued that he was unable to see what occurred thereafter because the participants in this drama had moved off the screen or behind the Roadway truck, until two police cars and a canine unit van arrived. He stated that the policemen spoke to Wahler and to a business agent of Local 222, searched the automobile of the "individual that had punctured the tire, . . . questioned two individuals and I saw them put them against the car, . . . arrested those two guys. They put them in the car. . . . I saw the business agent--a cop walk over to him and before I knew it, the cop was taking him--putting him against the car and he was putting handcuffs on him." Mayorek related that the police vehicles then drove away, the Roadway Express Company truck drove in "and that was the extent of it." According to Mayorek, the Respondent's representatives present either inside or outside the plant at this time were Rizzuto, Bob Pearson, John Raab, Thom Kane, himself and "some other individuals, too . . . maybe between eight and ten of us."

Mayorek testified that after the Respondent's representatives and Wahler had gone inside the Conair building, and later that evening, he observed a car driving "up and down Executive Avenue very fast" and another car parked in the parking lot of a building in the vicinity of the plant. Mayorek stated that he called the police and upon their arrival observed the police talking to three or four individuals, "And I just heard the cop holler, and say, what did you call me, and after that they took the three of them away and that was it." Mayorek added that he recognized some of the people involved in this later incident outside the plant as being the same persons connected with the incident involving Wahler earlier that evening, including Stephen Olah.

179/ Mayorek identified the man who pushed Wahler as "Joe Olah," with "blond hair, a deep red complexion, about 5'10", 5'11", probably 225 pounds in that area." According to the General Counsel's witnesses, including Stephen Olah himself, Olah was among those present when this incident happened, is 5 feet 7 inches in height, weighs 125 pounds and has blond hair. The evidence herein indicates that Mayorek probably identified Joseph O'Keefe, who is 5'7", has grey hair and a "red oval" face and weighs 180 pounds.

Ronald Matalaveg, the Roadway Express Company's terminal manager, called as a witness for the Respondent, testified that sometime in July 1977, he, Roadway truckdriver Don Wieland and Roadway dispatcher Fred Jaager, drove a tractor-trailer truck to the Respondent's plant arriving there at "between six and seven" in the evening at which time he observed, "a disturbance in the street blocking the entranceway that we would have to take the truck through." Matalaveg continued that when Wahler saw the Roadway truck he ran towards it, the truck being about 50 yards from the entranceway at the time. He stated that he got out of the truck "to see what the disturbance was all about" and Wahler said, "Get the truck out of here, get the truck out of here." According to Matalaveg, "I asked him what he was doing there, and the only answer he could give me was that, look at my truck, look at my truck. Look what they have done to my truck."

Matalaveg testified that Wahler's pickup truck was parked in the middle of the roadway, had a flat tire and had "a few dents in it." Matalaveg continued that at about this time a "white haired gentlemen" 180/ approached him, identified himself as "a representative of the International Ladies' Garment Workers', I believe, . . . asked me to cooperate with them and not bring the truck through the picket lines." He stated, "After O'Keefe was done talking with me, he interrupted himself and just ran after Wahler, started pushing Frank again. He kept motioning towards a "rather large gentleman, that he was going to get Frank. 'I'll get him to get you.'" Matalaveg added that he was pushed to the side and "They chased Frank behind a truck. . . . I didn't see what happened on the other side." He related that the police arrived and took a few of the "demonstrators," who were "running around" in the street, into custody, after which the Roadway Express Company employees "went inside the Conair facility . . . left the trailer we brought over and we picked up the trailer that was there and left and went back to the /Roadway/ terminal," with Wahler remaining at Conair.

Matalaveg additionally testified that Wahler's presence at the Respondent's plant was unexpected since Wahler was off duty at the time and neither he nor the dispatcher had instructed Wahler to go to Conair. He stated that he told O'Keefe that he did not know why Wahler was there and that his own appearance at the Respondent's premises was in no way connected with Wahler's presence at the Conair plant that evening. 181/

Another witness called by the Respondent in connection with this incident was Louis Russo, the Respondent's warehouse manager. Russo testified that Wahler's appearance at the Respondent's plant was unexpected since Wahler had not called him prior to his arrival at Conair that evening. 182/ Russo stated that the building's "bay doors were open" that particular evening because it was warm outside and that he therefore saw the "disturbance outside" involving Wahler, the Roadway Express Company dispatcher, and the "three union

180/ The evidence indicates that the "white haired gentleman" was O'Keefe.

181/ Matalaveg denied that Wahler's nickname among the Roadway Express Company employees was "Wacky Wahler."

182/ Russo stated that Wahler on occasion drove trucks to the Respondent's plant for loading but only in the mornings, he had never previously seen Wahler at Conair during the evening.

representatives" and observed the Roadway tractor-trailer truck and Wahler's pickup truck in the road. Russo added that he also saw "the police take a couple of the union representatives away in the police car." 183/

John Raab, another of the Respondent's witnesses, testified that on the evening of the "Wahler incident" he was standing near the flagpole in front of the Respondent's plant along with Tom Thomas, the Respondent's security guard, and Tom Kane, one of the Respondent's salesmen, when he observed Wahler approach the plant in a small pickup truck. 184/ He continued that there were a "series of pickets down by the receiving entrance--driveway entrance" having a discussion with Wahler when a scuffle broke out, "one big fellow in the crowd went back to his car, brought a large object out from the car and tried to hit Mr. Wahler with it." He added that there was pushing and punching, "fistcuff-type action," and Wahler was struck with the "large object," a car jack handle. Raab stated that when he saw this he told Russo to call the police, which Russo did, and then several of the people in the plant, including himself, went outside and when the police came they arrested the man who had struck Wahler.

Raab continued that later that evening there were additional cars spotted in the vicinity of the Respondent's plant and since Wahler was still at the premises the police, who had earlier departed, were recalled. He stated that after their arrival the police "arrested the group of people that were there," one of whom he recognized as Stephen Olah. Raab also testified that the incident involving Wahler occurred in the early evening after all the Respondent's production, service and maintenance and clerical employees had gone home.

The General Counsel's witnesses gave a different version of what occurred that evening, July 21, 1977. Joseph O'Keefe testified that on July 21, 1977, at approximately 7:15 in the evening of that day he, Stephen Olah, and four other persons 185/ were "outside of the Conair plant by the receiving driveway . . . observing trucks coming and going because the warehouse operation was working overtime that night." O'Keefe stated that they had left the Respondent's premises earlier when the pickets had left, with the intent to return later on when, on their way back to Conair, O'Keefe experienced motor problems with his car. He related, "When I came back, I pulled the car over to the side by the driveway, receiving driveway, and we lifted up the hood and found that the fan belt had ruptured and we were trying to repair it at that time." O'Keefe continued that shortly after their return to the Conair plant that evening, they saw "some people" come out of the office section of the plant, and he recognized Mayorek among them, because Mayorek's leg was "broken or something," and also the Respondent's security guard Tom Thomas. 186/ O'Keefe added that Thomas came

183/ Russo testified that Rizzuto had asked him to call the police when the argument began, which he did.

184/ Raab testified that he and Thomas both carried "new walkie talkies," hand held radio transmiting and receiving equipment, which they were testing at the time.

185/ Miguel Gonzalez, Julio Jokeen, Rafael Rivera and Cisto Robles.

186/ Olah in his testimony, identified John Raab as also being present in this group.

over to them and spoke individually to Olah but O'Keefe advised Olah not to have any discussion with Thomas whereupon Thomas "backed off somewhat." 187/

O'Keefe testified that a few minutes later a pickup truck arrived on the scene and parked in the middle of the roadway, "just before the driveway" or rear entranceway. O'Keefe continued, "Well when the pickup truck stopped, I walked over and when I got to the truck, the driver commented loudly that, 'you fucking guys hurt a couple of my drivers the other day,' and I said, . . . if you have a problem like that, you shouldn't be telling it to me, you should be telling it to the police." He stated that Wahler, after identifying himself as the union shop steward at Roadway Express Company "repeated again about how his drivers were beat up, and before I could comment, he started raving about he was going to blow my fucking brains out. He reached down as if he had a gun. He reached under the seat. With that, I stepped back, and he kept raving about how he was going to blow our brains out. Next thing I knew, he stepped out of the truck and at about that point, his tire was deflated, by whom, I don't know, but he was raving about his tire." 188/ O'Keefe continued that after Wahler got out of his pickup truck he continued to yell, "I will blow your fucking brains out" and feigned towards his pocket as if he had a gun. He related that he actually believed at the time that Wahler had a gun in his possession. 189/ According to O'Keefe, "Well, then Rafael Rivera came running over with a jack, he had his /trunk/ open before the pickup had arrived, he was getting tools to fix my car, and he was very excited about what this guy had been screaming at me, and then the two of them got in a confrontation and then it was general turmoil, pushing, shoving, threatening, a whole scene. . . ." 190/

187/ Olah testified similarly about this adding that Thomas told him, "Steve, are you out here to cause trouble again?", to which Olah responded, "No," and then O'Keefe told Olah not to "talk to him." Olah also related that this entire incident occurred after the Respondent's "production and maintenance employees and secretaries" had gone home.

188/ While O'Keefe did not know what instrument was used to deflate the tire he did testify that tools such as a screwdriver were being used to repair his car.

189/ Wahler denied making any threats against any of the persons there or calling them obscene names. He also denied having a gun in his possession at the time or ever owning one.

190/ O'Keefe testified that Rivera might have struck Wahler with the jack since he was swinging it at Wahler, but he couldn't have hurt Wahler much since Wahler continued to be "very active" and Rivera is a big man and if he hit Wahler squarely with the jack, "he would have knocked him down." Additionally O'Keefe admitted that he may have pushed Wahler during this confrontation.

O'Keefe testified that a Roadway Express "truck trailer" then drove up and an individual came out of the truck and identified himself as that company's "traffic manager" and indicated "very strongly" that Wahler was not sent there by the Roadway Express Company, and that "This man has nothing to do with us." According to O'Keefe, the police arrived within a few minutes thereafter and, "I advised the sergeant, Quigley, that we had been threatened by a gun by Wahler and the cop asked whether he had a gun and he gave a cursory search of his truck. He didn't find any gun." O'Keefe continued that the Respondent's security guard, Thomas, "kept instructing the sergeant as to who did what, and I felt he was kind of intervening, and running the show and I told the sergeant that I didn't appreciate this guard interfering. I said, 'He's part of the company here, and we are at odds with the company right now. We're involved in a strike,' and the sergeant says, 'I'll do whatever the hell I want to.' I said, 'Well, shame on you--' that's what I said, and with that, he had me locked up and he said 'Place this man under arrest.'" 191/

Olah's account of this incident is substantially similar to that given by O'Keefe in almost all respects. He stated additionally that he did not participate in this occurrence but remained primarily in the background, observing what was happening. Olah was not one of those arrested at the time. 192/

Concerning these arrests, Edison police officer William Mintchwarner testified, 193/ in substance, that he arrived at the Respondent's premises at 7:30 p.m. on July 21, 1977, as "back up" for other police officers who had been summoned to the Conair plant. He stated that a "white haired" gentleman, (O'Keefe) had become abusive to a fellow officer, Stephen Szalay, investigating the incident, "hollering, yelling, cursing," and generally interfering with Szalay who was listening to Wahler's account of what had previously transpired. He continued that Officer Szalay told O'Keefe to wait his turn and relax, but that O'Keefe persisted in intervening between them and after O'Keefe pushed Officer Szalay, Szalay arrested him. Mintchwarner recollected that Wahler's truck had been damaged, having its windshield broken and a tire punctured. 194/ Mintchwarner denied that Officer Szalay had made the arrest in the following manner; "walked several feet up to where this white haired man was

191/ O'Keefe testified that he, Rafael Rivera and Cisto Robles were all arrested at about 7:30 that evening. O'Keefe was charged with "Interfering with a Police Officer investigation, a violation of an 'Edison Township Municipal Ordnance.'"

192/ According to the evidence herein, Olah was arrested later that evening in an incident involving two cars allegedly being driven back and forth in front of the Conair plant while Wahler still remained inside the building after the above incident had occurred between him and the Union's representatives.

193/ Mintchwarner testified as a witness for the Respondent.

194/ Wahler did not contend that his windshield had been smashed. Also the video tape recording of this occurrence does not show Wahler's pickup truck windshield as having been broken.

standing after a conversation, grabbed him by the right arm, twisted his right arm behind his back and up into the air, threw him on to a car and then handcuffed him." 195/ Further, while Mintchwarner had originally and more than once testified that O'Keefe had pushed Officer Szalay, he subsequently admitted that he did not actually see this himself but had read it in the police report of the incident.

In reviewing the video tape of this incident (General Counsel's Exhibit 101(h)), I find that critically important parts of Officer Mintchwarner's account of what occurred are not substantiated. Significantly, the tapes show no assault by O'Keefe upon Officer Szalay nor any resistance by O'Keefe during his arrest, as alleged by Mintchwarner. Further there are discrepancies in his testimony which reinforce the conclusion, admitted to in part by Officer Mintchwarner, that when he testified, aside from remembering generally what occurred, his memory of this incident was somewhat "hazy."

Edison Police Officer Stephen Szalay 196/ also gave testimony concerning this incident. He testified, "I was detailed by headquarters to investigate a disturbance at Conair," and upon his arrival at the plant saw "a pickup truck and a passenger vehicle and a group of people around it . . . 15, 20 people." Szalay continued that after speaking to "the man in charge of Conair, I don't recall his name . . . ," he proceeded to investigate Wahler's complaint that he had been assaulted and prevented from entering upon the Respondent's premises. Szaley stated,

> I was interrupted several times by another gentleman who wasn't involved with that incident and I told him several times to stop interrupting my investigation, and with that he continued, and with that I placed him under arrest for interfering with a police officer. / 197/ /

Szalay added that O'Keefe called him a "Pig" and said, "You don't know what you are doing. . . . You ought to be ashamed of yourself for what 'you are doing,' and other things that interrupted my investigation." Szalay could not recall anything else O'Keefe had said.

Officer Szalay also testified that it was only after he had warned O'Keefe to cease his interference and O'Keefe had failed to do so that he placed O'Keefe under arrest, with the help of a fellow officer. "I think it was Sergeant Quigley and I placed the cuffs on him and we transported him into our headquarters." Szalay related that while O'Keefe did not actually push him, he started pushing other persons standing near Szalay and "he was then placed under arrest." He admitted that during his investigation and before he arrested O'Keefe, he had questioned Mayorek, Wahler, Thomas and "two Spanish speaking people" who were difficult to understand because they spoke "broken English," concerning this incident but had not spoken to O'Keefe about what happened. Szalay continued that this incident occurred on the evening of July 21, 1977, at

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195/ The video tape recording of this incident tends to refute Officer Mintchwarner's denial of this.

196/ Officer Szalay testified as a witness for the Respondent.

197/ It is uncontroverted that the "gentleman" referred to by Szalay was Joseph O'Keefe, one of the Union's organizers.

about 7:30 p.m., and that he left the Conair plant site with his prisoner O'Keefe at approximately 8 p.m. 198/

Employee Affidavits Concerning Incidents During the Strike

During the course of his testimony in the instant proceeding, Mayorek testified that the Respondent obtained affidavits from approximately "30 to 50" of its employees concerning alleged incidents in and around the picket line. Mayorek stated,

> I don't know---you know, how each person came to come to the front office. I don't know exactly how that came about. It would happen on many occasions that if a person wanted to tell a story, just came up to the front office.

He continued that if the employee spoke Spanish an interpreter would be used and that these affidavits were taken by his secretary Linda Murray, himself, or "someone else," whoever was available and that either Murray or another secretary would transcribe their statement.

Mayorek related that those individuals taking the employees' affidavits were instructed not to interrogate the employees but to "just let them tell the story and get as much information as possible. . . . " He denied interrogating employees himself and asking any of them if they had signed Union authorization cards. 199/ Mayorek also denied telling the employees that the Respondent wanted the affidavits as evidence against the Union although he did state that he told them that the purpose of these affidavits was to document the incident. 200/

John Raab, the Respondent's vice president for operations, testified that he was aware that "a number of employees were being called into the office and being asked to sign statements relating to the incidents which occurred on the 11th and 12th to bring to the court." He admitted being responsible on

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198/ It should be noted that the video tape recording of this incident (General Counsel's Exhibit 101(b)), if anything supports the testimony of the General Counsel's witnesses rather than that given by the Respondent's witnesses including the police officers. Further while comment upon the nature of the arrest as concerns the amount of force used to accomplish it, would be inappropriate in this decision, still the tape is enlightening in this respect and as one of the Respondent's vice presidents John Raab testified, "Somebody was assaulted by the police. Thrown to the ground."

Additionally, General Counsel offered into evidence (General Counsel's Exhibit 104) a notice issued by the Respondent to the Edison Police Department which grants to Edison police officers a "20%" discount on all Conair products purchased by them.

199/ As previously stated herein, Gustavo Rodriguez testified that Mayorek had asked him if he had signed an authorization card for the Union and the reason for his failure to report to work on April 11 and 12, 1977, the first two days of the strike.

200/ The evidence herein shows that Mayorek notarized the employees' affidavits.

occasion for directing the "supervisors or production manager" to bring "these people" into Mayorek's office.

Linda Murray, Mayorek's secretary, testified that when she took an employee's statement she asked the employee "what exactly happened" and the employee would tell her. According to Murray she would then type the statement, have the employee read it and then sign it, and that was "all that was said" or done.

Another of the Respondent's witnesses, Delfina Rodriguez, testified that when she reported to work on April 12, 1977 her "foreman" Nancy Rodriguez directed her to go to the front office and "tell about what had happened." 201/Although Rodriguez stated that she could not remember if she had read the affidavit or it had been translated for her before she signed it, she then testified, "It was read to me, and all I did was to sign it. What I wanted to do was to leave there because I was nervous, and I wanted to leave as soon as possible."

Jose Cruz, testified that he gave an affidavit to the Respondent, "For two reasons, that I wanted to keep my job and at the same time to tell them about the problems in case something happened in the future." 202/

Gustavo Rodriguez, another employee witness for the Respondent, stated that upon his return to work on April 13, 1977 he was asked why he had not appeared for work on April 11 and 12, 1977, whereupon he advised the Respondent that he had been threatened by the pickets and therefore did not report to work. 203/ He continued that Rosa Cruz, his supervisor, then told him that he would have to give an affidavit to the Respondent and "they took me to the office." Rodriguez admitted, after at first denying it, that he had been asked if he signed an authorization card for the Union. He also admitted giving the information contained in his affidavit in response to questions that were asked of him while he was in the front office with Mayorek present to take his oath and notarize his signature. As indicated hereinbefore, Rodriguez tesified that the reason he said what he said in his affidavit and in his testimony given in this proceeding, as well as why he didn't tell the Respondent the truth about his having signed an authorization card for the Union, was that "I have to support my mother and my woman with two children" and he was afraid of losing his job.

Matilda Morales, another employee witness who had supplied the Respondent with an affidavit concerning alleged threats made to her in and around the picket line, testified that she was asked about the purported incident by the Respondent "in the office." 204/ The evidence herein shows that Morales

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201/ Rodriguez testified that this happened after the "bus incident," involving the broken window in the minibus discussed hereinbefore.

202/ A more detailed discussion of Cruz's testimony appears hereinbefore.

203/ Rodriguez did not identify the person who had asked him about this.

204/ While Morales could not recall who had asked her, she stated she explained the incident "to a girl" while Naomi Rodriguez translated.

actually gave the Respondent two affidavits, the second one "supplements the one I previously gave," and which corrected some statements made by her in the first one. The second affidavit includes therein the following statement, "I cannot read English and no one translated the prior statement to me that I signed."

The April 20, 1977 Mailgrams

It is undisputed that on April 20, 1977, the Respondent sent a mailgram to each of the striking employees 205/ which stated in both English and Spanish 206/ therein:

> We have called you repeatedly to your job, despite your promises to do so, you have failed to report for duty, there is no violence, employees freely enter the plant. Unless you report for work on Friday, April 22, 1977 at your regular starting time you will be deemed to have voluntarily quit your job." /207/

205/ The parties stipulated that the following employees "ceased work and went out on strike on April 11, 1977 and that these employees participated in the strike and picketed during the strike which ended on September 23, 1977:" Lucille Allen, Miguel Aquino, Genovena Arocho, Maria Arocho, Shirley Bagby, Michael Billings, Etta Burns, Hector Carabello, Yvette Casquette, Olga Chalfa, Raymond Crespo, Celia Cruz, Dominga Cruz, Rosita Cruz, Martha Davison, Christina De Armas, Hilda Della Torre, Patricia Eaford, Celia Febles, Ana Rose Fernandez, Noris Garcia, Margarita Gautier, Lydia Gonzalez, Wilfredo Guerrero, Gloria Guzman, Hiriam Guzman, Florence L. Heimbuch, Juan Hernandez, Carmen Irizzary, Florence F. Jacko, Alice Jones, Beulah Jones, Flora F. Kurtanick, Evelyn Lee, David Letendre, Richard Letendre, Dorothy Lodato, Carmen Lopez, Enrique Luciano, Rosaria Machin, Victor Maisonet, Irene Martinez, Laura Martinez, Luz M. Melendez, Jose R. Mendez, Miliady Mendez, Noraima Mendez, Rosalia Mendez, Roberto Mercado, Elizabeth Muniz, Jose Negron, Antonio Neiro, Adamina Nieves, Adolfo Nunez, Jose Nunez, Stephen Olah, Luis B. Ortiz, Adrian Pagan, Annette Palmer, Martha Parada, Julia Pellallera, Hilda Perez, Yillian T. Perez, Denise Perrotte, Lilia Quiles, Alicia Rivera, Jose R. Rivera, Virginia Rivera, Awilda Rodriguez, Gertrudes U. Rodriquez, Ana Santiago, Rufina Saez, Jesus Santiago, Jose Santiago, Wildilia Santiago, Carmen Sanson, Carmen M. Sargardia, Ernesto Soto, Portinia Soto, Rosaur Soto, Ismael Torres, Aida Iris Torres, Rafael Valdes, Alberto Vargas, Felix Vazquez, Jose Vazquez, Wilfredo Vazquez, Elsi Vega and Luz C. Villanueva. Excepted from the stipulation were employees Verta May Allen, Milagros Muniz, Alida Pabon, Olga Rios and Sonia Torres. However each of these employees testified that they were employed as assembly line workers, had signed Union authorization cards, joined the strike on April 11, 1977 and picketed until it ended on September 23, 1977.

206/ As indicated hereinbefore, the majority of the Respondent's employees at this time were Spanish speaking and could not, without some difficulty, read and understand English.

207/ General Counsel's Exhibit 4-1.

Mayorek testified that as far as he knew none of the striking employees who were sent this mailgram "showed up" on April 22,1977 as directed therein. He added that the Respondent considered all the striking employees who failed to return to work on that day as having "voluntarily quit their jobs."

The Hiring of Arthur Marin as Personnel Director

John Mayorek testified that, "with the company getting bigger and many more people coming, my time was limited, I had many other functions--and I said we would get a personnel manager, we would adopt a personnel department in the company, which we never had before." 208/ The Respondent placed advertisements for a personnel director in the New York Times on Januar 9, 1977 and the Star-Ledger, a New Jersey newspaper on January 8 and 30 and February 16, 1977. 209/ Mayorek continued that the first time "either myself or one of the other supervisors" told the Respondent's employees that the Respondent intended to hire a bilingual personnel director was "in one of the early '77 grievance committees" meetings. However Mayorek could not recall who was present at the meeting, when the meeting occurred or what was actually said. 210/ Mayorek added that he also told employees about the decision to hire a bilingual personnel director on other occasions when employees "approached me for clarification on something. . . between . . . December of '76 or January of '77 and the period up until the time that we did hire a man." Again Mayorek could not recall when or with whom this occurred. Leandro Rizzuto testified that the Respondent had "scheduled for the beginning of the year to hire a personnel director. . . ."

Mayorek continued that after the Union commenced its organizational activites at Conair, he advised all the Respondent's employees in the production, maintenance, service and warehouse departments at a large "group" meeting that

208/ Further, Mayorek also testified that as a result of an audit by the New Jersey Department of Labor in December 1976, the Respondent was advised to improve its record keeping procedures and "That's when we became aware that there would be a need /for/ professional people in the personnel department. . . ." So, we authorized the hiring of a personnel manager. . . . "However Mayorek acknowledged that the New Jersey Department of Labor had not required the Respondent to hire a personnel director nor in fact mentioned anything about such a position, the Respondent being merely advised to better its record keeping.

209/ The Star-Ledger advertisement includes "Fluent in Spanish, a plus." However it appears that being bilingual is not a prerequisite to hire but merely desireable as an additional skill for an applicant. See Respondent's Exhibits 28, 29 and 56.

210/ Mayorek testified concerning his failure to recall these particulars, "Well, if I get the minutes of the meeting which I am sure I have, I can recall." While the Respondent admitted the availability of the minutes pertaining to grievance committee meetings, at no time during the hearing did it proffer into evidence the minutes referred to by Mayorek.

the Respondent was "looking into hiring a personnel director that they could go to with the questions that they had proposed." 211/ While Mayorek admitted that he had never told the employees about this before at a mass meeting he explained, "because that was the first time that we had called the large group together for that particular year." Mayorek also related that it is not the Respondent's policy to "generally inform the employees about hiring and firing decisions" concerning management employees.

In this connection and as set forth hereinbefore, Stephen Olah, Florence Jacko, Noraima Mendez and Lucille Allen all testified that the very first time they heard about the Respondent's intention to hire a bilingual personnel director to handle employee problems and complaints was at the April 4, 1977 mass meeting of all the Respondent's unit employees when Mayorek told the employees about it. 212/ Mendez also testified that Jerry Kampel made a similar statement when he spoke to the employees at the April 4, 1977 meeting.

As stated before the evidence shows that Arthur Marin was hired by the Respondent as its personnel director on June 1, 1977. Marin testified: 213/

> I was hired by a head hunter which is a term used for Executive Research Firms who was hired by Conair Corporation looking for some individual that would have bilingual background, experience in labor relations. 214/

According to Marin his duties are, "in hiring, promotions, demotions, training supervisors, taking care of the problems of the employees in the plant, in the

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211/ Mayorek testified, "I told them on April 6th of 1977."

212/ As stated previously, Mayorek admitted making such a statement at a meeting of all the Respondent's employees during the week of April 4, 1977.

213/ Although, as indicated before there was a sequestration order in force during the course of the hearing, and Marin was present in the hearing room while various witnesses were testifying, I granted the Respondent's application to allow Marin to testify after counsel for all the parties herein informed me that they had come to an agreement concerning this, including "areas of examination that General Counsel and Charging Party's attorneys do not feel would be offensive to the spirit of the sequestration order" and upon my own feelings that his testimony was material and relevant and could be significant to the proper disposition of some of the issues herein.

214/ It should be noted that the advertisements placed in the newspapers by the Respondent earlier did not indicate bilinguality nor experience in the field of labor relations as necessary requirements for the jobs. In passing I also note that the contents of the advertisements do not mention anything about the handling of grievances although it is equally true that the duties of the position of personnel director at Conair are not set forth in any detail therein.

office, establishing the proposals for policy, for discussions with the president of the company and the executive committee." 215/

The June 9, 1977 Letter

Subsequently, as evidenced in the record, the Respondent sent the following letter dated June 9, 1977, to each of its striking employees:

> Dear Employee:
>
> Our telegram of April 20, 1977, is hereby rescinded. You are hereby offered full and immediate reinstatement to your former job or, if your job no longer exists, to a substantially equivalent position, upon your unconditional offer to return to work.
>
> The foregoing is without prejudice to our rights under the law.
>
> Conair Corporation

This letter sets forth the above in both English and Spanish. 216/ Mayorek testified that only two of the striking employees responded to the June 9, 1977 letter and returned to work and that the Respondent considered those employees who did not do so as being no longer Conair employees, "they were not interested in their jobs."

In this connection the General Counsel proffered the testimony of Jesus Santiago and the brothers Jose and Adolfo Nunez, all of whom testified that they received the Respondent's June 9, 1977 letter offering them reinstatement and reported for work at the Conair plant on Monday, June 13, 1977.

Jesus Santiago testified that when he returned to work on June 13, 1977 he was called into Personnel Director Arthur Marin's office, whereupon Marin told him, ". . . if I wanted to work I could sign the paper and if I didn't sign it

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215/ Marin testified that when he was hired he was told that one of his functions would be to listen to employee complaints and that he understood that one of his duties was to listen to such "gripes on valid complaints against management or working conditions."

216/ See General Counsel's Exhibit 7. In the General Counsel's brief there is a reference to a "discrepancy" existing between the English and Spanish versions set forth therein, with the English portion stating in pertinent part, "upon your unconditional offer to return to work," and the corresponding Spanish segment stating, "si usted acepta incondicionalmente nuestro ofrecimiento de volver a trabajar," which translated into English reads, "If you accept unconditionally our offer to return to work." Further, the Respondent in its brief asserts that the June 9, 1977 letter was "suggested by the agents of the NLRB" citing Mayorek's testimony. However Mayorek actually testified that this letter was mailed to employees upon the advice of the Respondent's labor counsel, Herbert Burstein.

then I couldn't work and since I wanted to work and I thought I was being given the same job as material handler, I signed." 217/ He continued that Marin instructed him to report for work on June 14, 1977 and when Santiago did so he found that instead of his material handlers job, he was assigned to a different job in the service department. Santiago added that he continued to work in the service department for 3 days, then rejoined the strike that same week on Friday, June 17, 1977.

Jose Nunez testified that he reported back to work on June 13, 1977 and went to the "company office" where he gave the June 9, 1977 letter he had received to "Maria . . . someone who works in the office." He continued that Maria told him, ". . . if I did not sign a paper she could not allow me to come into the company. Then I signed the paper, right." 218/ Nunez stated that Maria sent him next to see Arthur Marin who told him, ". . . he didn't have work for me on that day because he had another person in my position. Then he told me he would send me a notice to go back and take my work." He added that the Respondent never notified him to return to work and he rejoined the strike the next day, June 14, 1977.

Adolfo Nunez testified similarly. He stated that after reporting for work on June 13, 1977, he went to the office where "Maria asked me to sign papers and she would allow me to go inside to see /Arthur Marin/." He stated that he signed "the paper" 219/ although "I didn't know what I was signing because I don't know how to read. . . English . . . because otherwise I would not be able to go back to work." Nunez continued that after he signed "the paper" Arthur Marin took him to his office and told Nunez that he could not be returned to the same job he had previously and Marin also told him that "I was going to come in as a new employee" and to report for work the next day, June 14, 1977. He added that he then rejoined the strike instead of reporting for work.

Adrian Pagan, 220/ one of the striking employees, testified that sometime in July or August 1977, he received the following letter from the Respondent:

217/ The "paper" produced on the Respondent's letterhead or stationery is dated June 13, 1977, has a place for the employee's signature and contains the following statement:

> I, the undersigned have returned to work on the above date per the offer made by the Company's letter dated June 9, 1977.
>
> Signature_____.

See General Counsel's Exhibit 28.

218/ Jose Nunez identified General Counsel's Exhibit 29 as the document "Maria" had him sign. It is similar in content to the one signed by Jesus Santiago. See footnote 217, supra.

219/ Adolfo Nunez identified General Counsel's Exhibit 31 as the document he signed for "Maria." It is similar in content to the one signed by Jesus Santiago. See footnote 217, supra.

220/ Pagan was employed as an assembly line "material handler."

Dear Employee:

You have been requested on two occasions within the last three months, to report to work and you have failed to do so. Under our medical and life insurance policies, "Cessation of active service in a class of employees eligible for insurance shall be deemed termination of employment." Consequently, we have advised the insurance companies that you are not working for Conair.

You must also recognize that all accrued vacation benefits have been suspended and all forms will be mailed to you within 30 days.

Conair Corporation /221/

Pagan stated that subsequently, on or about July 18, 1977, he received a "Notice of Termination of Insurance and Conversion Privilege" from the State Mutual Life Assurance Company of America which states in part:

> This is to notify you that because of the termination of your employment the Group Insurance shall terminate (or has terminated) on the later of the two dates shown in items 5 and 6 below.

This notice also indicates that Pagan's insurance coverage was terminated on July 1, 1977 and that the reason for such termination, as given by the Respondent to the insurance company was "left job." 222/

The Strike Ends

By mailgram and by letter dated September 21, 1977, counsel for Local 222 notified the Respondent that the strike would end on Friday, September 23, 1977 and that an "unqualified and unconditional offer on behalf of each and every striking employee to return to work on the morning shift of Friday, September 23, 1977, or as soon thereafter as employment is available" was being made therewith. 223/ The letter further states that this constitutes a "continuing offer and application to return to work whenever employment is available," and that "The Union further takes the position that striking employees are entitled to reinstatement regardless of replacements." The Respondent's counsel, by mailgram dated September 26, 1977 to Local 222, accepted the offer and indicated that, "the former employees may apply to return to work." By letter dated September 26, 1977, counsel for Local 222 advised the Respondent that the strikers would be informed of the Respondent's acceptance of the offer and "instructed them to return to work on Wednesday, September 28, 1977."

221/ The letter is both in English and Spanish. See General Counsel's Exhibit 41.

222/ See General Counsel's Exhibit 42.

223/ Annexed to the letter was a list of strikers containing the same names as appear in footnote 73 supra.

September 28, 1977

As set forth hereinbefore in part, the parties stipulated that the following employees went out on strike on April 11, 1977, picketed during the strike until its conclusion on September 23, 1977, appeared for work at the Conair plant on or about September 28, 1977, and were reinstated to their former or substantially equivalent positions of employment at various times after September 28, 1977:

Lucille Allen, Maria Arocho, Rosita Cruz, Christina DeArmas, Florence L. Heimbuch, Carmen Irizzary, Florence F. Jacko, Beulah Jones, Flora F. Kurtanick, Dorothy Lodato, Victor Maisonet, Irene Martinez, Laura Martinez, Miliady Mendez, Louis B. Ortiz, Yillian T. Perez, Ana Santiago, Carmen M. Sargardia, Rosaura Soto and Ismael Torres on October 4, 1977;

Hector Caraballo, Hilda Della Torres, Margarita Gautier, Carmen Lopez, Luz M. Melendez, Hilda Perez, Alicia Rivera and Jose R. Rivera, on October 11, 1977;

Genovena Arocho, Olga Chalfa, Patricia Eaford, Rosaria Machin, Rosalia Mendez, Jose Negron, Antonio Neiro, Julia Pellallera, Lilia Quiles, Arvilda Rodriguez, Jose Santiago, Aida Iris Torrez, Alberto Vargas and Elsie Vega on October 12,1977;

Adamina Nieves, Virginia Rivera, Rufino Saez, Portinia Soto, and Rafael Valdes on October 14, 1977;

Mayes Garcia, Gloria Guzman, Juan Hernandez, Roberto Mercado, Elizabeth Muniz, Wadilia Santiago, and Felix Vasquez on October 18, 1977;

Miguel Aquino, Celia Cruz, Celia Febles, Wilfredo Guerrero, Alice Jones, Noraima Mendez, Martha Parada, Jose Vazquez, and Wilfredo Vazquez on October 19, 1977;

Etta Burns, Hiriam Guzman and Carmen Samson on October 24, 1977; Michael Billings, Dominga Cruz, Martha Davison, Evelyn Lee, Annette Palmer and Denise Perrotte on November 2, 1977;

David Letendre, Richard Letendre, Raymond Crespo and Ann Rose Fernandez on November 7, 1977.

the following were not returned to work:

Shirley Bagby, Yvette Casquette, Lydia Gonzales, Enrique Luciano, Jose R. Mendez, Adolfo Nunez, Jose Nunez, Stephen Olah, Adrian Pagan,

Gertrude U. Rodriguez, Jesus Santiago, Ernesto Soto, and Luz C. Villanueva. 224/

The undisputed evidence herein shows that along with the strikers who reported for work at the Respondent's plant on the morning of September 28, 1977, were Union representatives Hugh Harris and Jerry Rivera and the Union's legal counsel, Melvin L. Gelade. 225/ While there is general agreement between the parties as to what occurred that morning, there is some disparity between the testimony of the General Counsel's witnesses and that given by the Respondent's witnesses, as to what was said by the various participants therein.

Both Rivera and Harris testified that between 7:30 and 8:00 on the morning of September 28, 1977, all the striking employees and the Union's representatives appeared at the Conair premises whereupon one of the Union's organizers took attendance and directed the strikers to report for work. 226/Harris stated that after he, Rivera and Gelade were told by some of the employees that they had been denied admittance to the plant by Tom Thomas, the Respondent's security guard, because "they were new employees, they no longer worked there and they would have to fill out job applications with the personnel department," he and Gelade approached Thomas and asked about this. Both Harris and Rivera testified that Thomas confirmed this action and told them that John Mayorek had instructed him not to allow the striking employees to enter the Conair plant but instead to instruct them to wait until the Respondent's personnel office opened at 9 a.m. in order for them to fill out "new applications."

Harris continued that Mayorek arrived at the plant a few minutes later and Gelade asked him why the striking employees were not being allowed to return to work to which Mayorek responded that "they were new employees and that they would have to fill out job applications in the personnel department." 227/ Harris related that Mayorek told them that the new job applications

224/ Excepted from this stipulation were: Verta May Allen, Milagros Muniz, Alida Pabon, Olga Rios, and Sonia Torres. Alida Pabon testified that she reported to the Respondent's plant on Setember 28, 1977 to resume work, as did the other strikers, filled out an employment application and returned to work pursuant to a telegram from the Respondent, on October 26, 1977. Verta May Allen, Sonia Torres and Milagros Muniz all testified similarly except that they returned to work on October 11, 1977, October 18, 1977 and October 4, 1977, respectively. Olga Rios also testified similarly except that she stated that although she received a mailgram from the Respondent to report for work she had failed to do so because her babysitter "had a broken arm" and "could not take care of my kid."

225/ As hereinbefore indicated Harris was the district manager of Local 222 and Rivera the assistant manager at the time.

226/ Harris testified that there were a total of "90 or 95 people present."

227/ Rivera testified similarly stating that Mayorek said, "the former employees will have to fill out new applications . . . ," when the personnel office opens at "8:30, 9 o'clock." Additionally several of the General Counsel's other witnesses also testified about this relating that they heard both Mayorek and Thomas refer to the striking employees as "new" or "former" employees at the time. For example see the testimony of Stephen Olah, Noraima Mendez, Rosaria Machin and Shirley Bagby. Additionally Bagby testified that on that morning while she was situated near a "little side

would be reviewed by the Respondent and the striking employees would be considered for jobs when work became available. 228/

Harris testified that when Gelade objected to this procedure, asserting that the strikers were still employees and that the Respondent should discharge any replacements hired in their stead, Mayorek said, "You guys blew it in your letter, because . . . you stated that the employees were . . . ready to return to work when work was available and at present no work was available." He related that Mayorek refused to discharge any of the striking employees' replacements and said that the Respondent had "a full complement of employees in there, approximately 300 people and there was no work available at this time." Harris stated that when he asked Mayorek if Mayorek was refusing to take the strikers back to work Mayorek reiterated that as former employees they would have to fill out new job applications with the Respondent's personnel department which would be reviewed and considered when work became available. Local 222 finally agreed to having the strikers fill out the employee application forms but under protest and "only for the purpose of providing the Company with current information." The record shows that none of the strikers were reinstated that day.

Mayorek's testimony was similar in many respects to the above. He testified that about 100 strikers showed up that morning pursuant to Local 222's offer on behalf of the employees to return to work but were refused entrance because there were no job openings that could be filled at the plant. 229/ Mayorek stated that there were no jobs available for the strikers because replacements for their jobs had been hired during the strike and the Respondent refused to discharge any of them for the purpose of reinstating the strikers. While Mayorek initially denied classifying the strikers as new or former employees during that morning, he subsequently acknowledged in his testimony that he might have done so since he could not actually recall what references he

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227/ door platform" on which Ann Gere, the chief line supervisor was standing, "this new guy walks up and he looked at us, and he says, 'Are you getting your jobs back?' She /Gere/ says, 'No, they're new employees, you still have a job, so you just come on in.'" Gere denied that this had happened.

228/ Rivera tesified that Mayorek had also stated that the Respondent wanted new applications completed by the striking employees in order to "update the records at the plant." Mayorek testified that he had explained to Harris and Gelade that the Respondent wanted these applications in order to update certain information in the striking employees' personnel files, such as addresses, social security numbers and telephone numbers.

229/ Interestingly the evidence herein shows that on September 25, 1977, the Respondent published an advertisement in a local newspaper seeking employees as "Assemblers, Testers and Quality Control Inspectors" which covered the job categories of the strikers. See General Counsel's Exhibit 57.

made about the strikers 230/ at the time. 231/ Mayorek also testified that the strikers were required to fill out the employment application as a precondition of reinstatement. He acknowledged that in the past the updating of an employee's personnel file was frequently done by calling the employee into the personnel office and asking for such information personally.

According to the testimony of Harris, Rivera and Mayorek, it being a cold and windy day, with the strikers standing unprotected outside the Respondent's plant, Mayorek obtained employee application forms from inside the plant and gave them to Local 222 for distribution whereupon the strikers and the Union's representatives returned to the "union hall" where the strikers completed the job applications, which were subsequently forwarded to the Respondent. The evidence herein shows that each of the strikers filled out an employment application which the Union then submitted to the Respondent. The evidence further shows that the Respondent, by mailgram, offered reinstatement to 81 of the strikers on various dates between October 4, 1977 and November 7, 1977 as hereinbefore set forth. These mailgrams were in English and stated:

> Please be advised that you are expected to begin/return to work on (day of week) morning (date) at 8:00 a.m.

Further, Mayorek testified that usually any communications between the Respondent and its employees was prepared in both English and Spanish because at the time of the events referred to herein, 75 to 80 percent of the Respondent's employees were Spanish speaking.

What Further Occurred Concerning the Strikers

The General Counsel's witnesses testified uncontrovertedly that as returning strikers they had to report either to the personnel office or to the cafeteria, before starting work on their respective dates of reinstatement, to fill out insurance and tax withholding forms. Florence Jacko, Lucille Allen, Flora Kurtanick, Dorothy Lodato and Beulah Jones, all testified that they saw "new hire" handwritten on their timecards and on those of other reinstated strikers after they returned to work. 232/ Jacko also testified that on one of

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230/ Mayorek testified that he deemed and concluded that all strikers who failed to return to work, pursuant to either the Respondent's April 20, 1977 mailgrams or the Respondent's June 9, 1977 letters, had quit their jobs and were therefore no longer employees of the Respondent.

231/ Previously, in a letter dated June 16, 1977 from the Respondent to the Board's Regional Director for Region 22, Mayorek referred to the striking employees as former employees. See General Counsel's Exhibit 56.

232/ Timecards introduced into evidence have the words "new hire ins" handwritten on them. Allen, Kurtanick, Lodato and Jones testified that they could not recall seeing "ins" written on their timecards when they initially saw them. Mayorek testified that "new hire ins" was written on these timecards in order to reactivate their membership in the Respondent's insurance program. He stated that these entries were made on the timecards by one of the Respondent's clerical employees. The evidence also shows that the employee identification number assigned to these employees upon their

the forms she filled out upon her return to work, Maria /Marques/, a clerical employee, crossed out Jacko's original date of hire and entered October 4, 1977, the date of her reinstatement as her new date of hire on the form. Further, on the attendance records of three reinstated strikers submitted in evidence, Rosario Machin, Lucille Allen and Noraima Mendez, the original dates of hire are crossed out, and the dates of their reinstatement following the strike substituted thereon.

Annette Palmer, Denise Perrotte, David Letendre, Evelyn Lee and Michael Billings, employed by the Respondent in its service department before the strike, 233/ all testified that upon their return to work after the strike ended they were offered assembly line jobs, instead of their original jobs in the service department, which they refused to take. These employees were then referred to Arthur Marin, the Respondent's personnel director, who advised them that their service department jobs had been filled by others, and they were given tax and insurance forms to fill out.

Palmer testified that after she refused the assembly line job Marin "made me sign something, saying that I refused the job that was offered me that day, and that I would wait until there was an opening in the service department." 234/ Palmer stated that Marin told her that none of the strikers who had previously worked in the service department would be returned to their old jobs in that department but instead were scheduled to work on the assembly lines. She continued that she returned to the service department to retrieve her coat and told "Darlene," Peter Valentino's 235/ secretary about what had occurred. According to Palmer, Darlene told her that someone was just then leaving a service department job and there would be an opening in that department whereupon she contacted Valentino outside the plant since he was out that day. She added that while she was there she observed "twice as many people in the service department then as there were when I left. . . . I saw there was a lot of people in the service department that used to work on the assembly line before we left." Palmer related that Mayorek now appeared in the

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232/ hire was retained on their timecards and other forms when they returned to work after the strike ended.

233/ The service department repairs or replaces defective products returned by customers, and handles customer complaints. These jobs entail clerical work, opening parcels received for repair or exchange, making the repairs, inventory keeping and preparation for and the shipping of repaired, returned or replaced merchandise.

234/ Palmer testified that she told Marin, "I understand that I'm supposed to have an equivalent job, the same job or an equivalent job. And he said, 'Well this is an equivalent job. You'll be making the same amount of money.' But it wasn't, because I never did work on the assembly line and I would have to be trained for it." Mayorek testified that Arthur Marin had prepared the statement given to Palmer and to other strikers who refused job offers. As is hereinafter noted, this also happened to the other service department employees mentioned above.

235/ Valentino was head of the service department at the time.

service department and asked what she was doing there and after she advised him that there was a job opening in the department and that, "Darlene is talking to Peter now and Peter said that--he does need us back; and somebody is leaving today," Mayorek told her, "I don't care what Peter says, Peter is no longer supervisor of the service department. They hired someone else, and there aren't any openings. I'm only allowed to have so many people in the service department, and as soon as there's an opening, I'll call you." Palmer was subsequently reinstated to a job in the service department. 236/

Similarly, according to their testimony, Perrotte, Letendre, Lee and Billings were offered assembly line jobs instead of their prior service department jobs upon their reporting for reinstatement after the strike. They were referred to Marin who told them there were no openings in the service department, had them fill out tax withholding and insurance forms and when they refused to accept the assembly line jobs, asked them to sign statements to that effect, which they all refused to do. Subsequently, as the record herein shows, Lee and Billings were reinstated to their service department jobs on November 2, 1977; Perrotte, on November 3, 1977; and Letendre, on November 7, 1977. 237/

The Respondent's Refusal to Reinstate Certain Strikers

The record shows that Shirley Bagby and Lydia Gonzalez, 238/ assembly line employees, Gertrude Rodriguez and Adrian Pagan, material handlers, and Stephen Olah, a service department employee, joined the strike when it began on April 11, 1977, picketed throughout the strike until it ended on September 23, 1977, and reported for work on September 28, 1977 at which time they were refused reinstatement to their former jobs. 239/ Although they complied with the Respondent's requirement to complete employment applications and the Respondent admittedly received these forms, the Respondent never offered any of them reinstatement nor ever contacted them to return to work after the strike ended. The Respondent asserts that these employees were refused

236/ Mayorek admitted that Palmer was not offered a job in the service department but one on the assembly line when she initially returned to work after the strike. He also testified that service department jobs were "different in some respects" from assembly line jobs, and that these departments are physically separated.

237/ Mayorek acknowledged that Perrotte, Letendre and Lee were initially offered jobs on the assembly line which they refused to accept, having been service department employees before the strike.

238/ Gonzalez also appears in the record under her maiden name of Lydia Arocho. See the Respondent's Exhibit 2 herein.

239/ Bagby, Gonzalez, Rodriguez, Pagan and Olah all signed authorization cards for Local 222, with, according to their respective testimony, Gonzalez having distributed six additional Union authorization cards to fellow employees at the plant about two weeks before the strike started and Bagby having passed out five cards to fellow strikers on April 11, 1977 in the Respondent's parking lot. Concerning Olah, the record herein shows clearly that Olah was one of the most active of the Union's adherents among the Respondent's employees.

reinstatement because they "Went out on strike action 4/11/77. Pleaded and found guilty of loitering and malicious conduct by the Edison Municipal Court." 240/

Concerning this Mayorek testified that he was aware that Bagby, Gonzalez, Rodriguez and Pagan had been arrested for incidents on the picket line on either April 11 or 12, 1977. As indicated before the Respondent sent all the strikers mailgrams dated April 20, 1977 demanding they return to work or face discharge, and letters dated June 9, 1977 offering to reinstate all strikers, including the above four. There is no evidence in the record that this was done by error or through inadvertence. It is the position of the General Counsel that by its actions the Respondent "voluntarily, knowingly and deliberately condoned any misconduct that it believed Rodriguez, Pagan, Bagby, or Gonzalez committed."

With regard to Stephen Olah, 241/ Mayorek testified that Olah was not reinstated because he was arrested on July 21, 1977 at the Respondent's plant although Mayorek's letter dated October 5, 1977, as hereinbefore set forth, lists the same reason for this action as Mayorek listed therein concerning Bagby, Gonzalez, Rodriguez and Pagan. Further, Mayorek stated that while he was present at the Conair plant when Olah was arrested on July 21, 1977, neither he nor anyone else in management had any evidence that Olah did anything wrong during the course of the strike. 242/ John Raab testified that he was also present at the plant when Olah was arrested during the evening of July 21, 1977 and that

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240/ See General Counsel's Exhibit 60 (a letter from Mayorek to counsel for the General Counsel, Robert Weisen, dated October 5, 1977). Also see the Respondent's brief wherein the Respondent states that the above employees were not reinstated because of "their convictions for violent and disruptive behaviour on and around the picket line." It would also appear that the Respondent never personally notified any of these employees that they were discharged for misconduct.

Additionally Charging Party's Exhibit 2, a certified copy of "information on file and of record in this Municipal Court of Edison, County of Middlesex, State of New Jersey," indicates that Pagan, Rodrigues, Gonzalez and Bagby were charged with "malicious damage" on either April 11 or 12, 1977; that on September 26, 1977 Bagby and Rodriguez, and on November 10, 1977 Gonzalez and Pagan, respectively, pleaded guilty to violating an Edison "Township Ordinance 51-2 (obstructing passage of Motor Vehicles)" and were fined $25.00 plus $10.00 court costs each with Gonzalez' and Pagan's fines being suspended by the judge presiding in the case. It should further be noted that pursuant to New Jersey Court Rule 7:4-2, the Municipal Court of Edison ordered that the pleas of Gonzalez and Pagan "shall not be evidential in any civil proceeding." No other testimony appears in the record which shows that these four strikers engaged in picket line misconduct.

241/ Olah was hired as a representative by Local 222 on December 20, 1977 and has worked continuously for the Union since that time.

242/ The only other evidence adduced by the Respondent concerning Olah's misconduct was the testimony of Prince Alfred but the Respondent does not contend that Olah was denied reinstatement because of this. As indicated above, Prince Alfred's tale is somewhat incredible.

although he observed the arrest he did not actually see Olah do anything wrong or illegal prior to his arrest. Further, and according to Mayorek, the Respondent does not have a policy of automatically discharging employees when they are arrested. 243/

Olah testified in detail as to what happened concerning his arrest. Suffice it to say that the incident occurred subsequent to the one involving Wahler, previously discussed herein, happening later that same evening, July 21, 1977, at a time when none of the Respondent's unit employees were in the vicinity of the Conair plant. No truck deliveries were being made to the premises and the incident involved no interference with nor assault upon employees, nor damage to any of the Respondent's property. Olah was arrested for "resisting arrest and something else," and his account thereof tends to show that his "peaceful" presence at the plant was contested by the Edison police present at the site who wanted the two remaining Union officials and Olah to leave the area 244/ and because a policeman blamed Olah for something happening to his motor vehicle which Olah had nothing to do with. Olah denied resisting arrest or committing any other offense at the time. 245/ Olah added that upon advice of counsel for Local 222 he pleaded guilty to the offense of "loitering," a violation of an Edison Township Municipal Ordinance and paid a fine.

As with the above previously discussed strikers, Luz Villanueva and Yvette Casquette, assembly line employees, joined the strike on April 11, 1977, picketed throughout the strike until it ended on September 23, 1977, and reported for work on September 28, 1977, at which time they were refused reinstatement to their former jobs. Both Villanueva and Casquette filled out employment application forms which were sent to the Respondent. They were not offered reinstatement.

Regarding Luz Villanueva, the uncontradicted evidence herein shows that the Respondent, while it had previously sent the June 9, 1977 letter to her correct address, "232 State Street, Apt. 4, Perth Amboy, N.J. 08861," forwarded a mailgram, dated October 17, 1977, advising her to begin work on October 19, 1977, to another address, "285 Watson Avenue, Perth Amboy, N.J. 08861," which Villanueva never received. Although the Respondent was made aware of this on October 28, 1977, it still refused to offer her reinstatement. 246/

243/ Mayorek testified that Anthony Schirripa, a truckdriver for the Respondent, was arrested in 1974, charged with receiving stolen property, and later acquitted, and is still employed by the Respondent. George Zadroga, a products inspector for the Respondent, was charged with assault during the summer of 1977 but was not discharged. However there was no conviction in these matters. Also it should be noted that Zadroga was alleged to be highly anti-union in his feelings, and Schirripa never supported Local 222.

244/ Olah testified that one of the policemen said, ". . . we're not going to babysit for you or Conair anymore."

245/ Olah, in his testimony, pointed to the fact that there were approximately 16 policemen present at the time armed with guns and clubs and each substantially larger in stature than himself. Olah is observedly slight of build.

246/ See General Counsel's Exhibits 4-1, 7; 37; 38, 11-11; and 69. It should be noted that on the application form filed by Villanueva, her correct address is listed unchanged.

Casquette's situation was different. She moved from "112 Rector Street," to "421 High Street, Perth Amboy, New Jersey." The Respondent's June 9, 1977 letter to her, sent by certified mail to the old address, although forwarded to her new address was never claimed by her at the post office and it was eventually returned to the Respondent but with Casquette's new address listed thereon. 247/ The evidence shows that the Respondent sent a mailgram on October 8, 1977, addressed to Casquette at "241 Harth Street, Perth Amboy, New Jersey" requesting her to return to work on October 12, 1977. 248/ Casquette testified that she never received this mailgram. As with Villanueva, the Respondent refused to offer Casquette reinstatement even after it was made aware of the above on October 28, 1977. 249/

Mayorek testified that he had been advised of the identities of the strikers who claimed that they did not receive mailgrams offering them reinstatement and that he investigated the matter. Further, he stated that Villanueva and Casquette would be reinstated "today" if he "found out that they had not received the telegram" offering reinstatement. As far as I am aware to this day neither Villanueva nor Casquette have been offered reinstatement by the Respondent.

Jesus Santiago, Jose Nunez, Adolfo Nunez, Enrique Luciano and Jose Mendez, employees of the Respondent prior to the strike, joined the strike on April 11, 1977, when it began and picketed during the strike. 250/ According to the evidence, Santiago, Jose Nunez and Adolfo Nunez reported back to work on Monday, June 13, 1977 pursuant to the Respondent's June 9, 1977 letter which they received. As indicated hereinbefore, the Respondent conditioned their reinstatement upon their signing statements that they had returned to work pursuant to the company's letter dated June 9, 1977 and in the case of Santiago assigned to a differrent job in another department when he returned to work on June 14, 1977. Santiago testified that he worked there for 3 days, then rejoined the strike on June 17, 1977.

Both Jose and Adolfo Nunez testified that they returned to work at the Conair plant on June 13, 1977 in response to the Respondent's June 9, 1977 letter. Jose Nunez stated that he was told by Arthur Marin that he would be advised when to return to work but never received such notification and meanwhile he rejoined the strike on June 14, 1977. Adolfo Nunez related that Marin told him that he would not be given his old job back but would be starting as a new employee and should report for work on June 14, 1977 at 8 a.m. He indicated that on June 14, 1977 he rejoined the strike instead of reporting for work.

Luciano testified that he never received the June 9, 1977 letter from the Respondent but since his friend and co-worker Jose Mendez had, they both went

247/ See General Counsel's Exhibit 76.
248/ See General Counsel's Exhibit 34-3.
249/ See General Counsel's Exhibit 69.
250/ Jesus Santiago was employed by the Respondent as a "material handler," Jose and Adolfo Nunez, who are brothers, as assembly line workers, Enrique Luciano as a porter, and Jose Mendez as a "production" employee.

to the Conair plant on June 13, 1977. Luciano stated that after he advised Marin that he had not received the Respondent's letter Marin told him to "wait" for the letter because without it, he could not be reinstated. Luciano continued that he and Mendez then rejoined the strike.

The record shows that all five of these employees continued to picket throughout the strike until it ended on September 23, 1977, then reported for work on September 28, 1977, at which time they were refused reinstatement to their former jobs. They filled out and submitted the employment applications required by the Respondent but were never offered reinstatement nor notified that they had been discharged. The Respondent, as evidenced in letters both sent by Mayorek and Counsel for the Respondent to the Board's Regional Office for Region 22, refused to offer these employees reinstatement because: Santiago had returned to work on June 16, 1977, "worked one day and never returned;" Adolfo Nunez "made inquiries about returning to work on 6/13/77 . . . but failed to do so;" Luciano "Returned to work on 6/13/77 but refused to sign statement of intention and walked out;" and Jose Nunez "worked for one day (June 13) and walked off the job;" and that they had thereby quit their employment. 251/

The Discharge of Strikers After Reinstatement

Jose Santiago

Jose Santiago, employed by the Respondent as a "material handler," testified that he joined the strike when it began on April 11, 1977, picketed until it ended on September 23, 1977, reported for work at the Respondent's plant on September 28, 1977, was denied reinstatement at that time, filled out an employment application and was reinstated to his job on October 12, 1977 pursuant to mailgram notification from the Respondent. Santiago continued that 4 days after returning to work he injured his right hand when he fell against a locker. 252/ He related that he reported the injury to his foreman who sent him to the office where he spoke to "a new representative who was there who was a North American" who spoke English and Spanish. 253/ Santiago stated that he was told to go to the hospital, which he did, and at the Perth Amboy General Hospital he was treated by Dr. Wiesenfeld, the same doctor who had set and treated the prior fracture of this same hand. Santiago added that Dr. Wiesenfeld bandaged the hand, gave him some medicine for pain and advised him to return in 3 weeks for a follow-up examination but said nothing about returning to work.

251/ See General Counsel's Exhibits 60, 69 and 72. The Respondent in its brief asserts that "these employees were terminated, consistent with the company policy to terminate employees whose absences are unexplained for three days or more."

252/ Santiago testified that he had first injured his right hand during the strike on August 21, 1977 when he suffered a fracture thereof. He indicated that by the time he was reinstated the fracture had healed.

253/ It would appear that this person was Arthur Marin, the personnel director. Santiago also referred to him as the "company director" and the "company representative."

Santiago testified that upon his return to work the following day he spoke to the same "company representative" he had seen the previous day, and after Santiago said he would be out of work for 3 weeks, was instructed to see the "company doctor." He continued that he visited the "company doctor" that same day who examined and treated his hand and told Santiago to return 1 week later. According to Santiago he visited this doctor for the second time on October 26, 1977, at which time the doctor told him he could return to work on October 27, 1977. Santiago added that in or about this time he received a telegram from the Respondent notifying him that if he did not report for work, he would lose his job. He related that he reported for work on October 27, 1977, even though his right hand still pained him, and was assigned work which required him to use both hands, whereupon after 3 days of work his hand became so painful and swollen that he could not continue working and he so informed his foreman and the "company's representative." Santiago related that the "company director" told him "everything was all right, he punched the card and he told me to come back later," and upon his return to work to bring "some proof from the doctor" about his disability.

Santiago continued that he returned to Dr. Wiesenfeld on November 10, 1977, approximately 3 weeks after he had injured his hand, and Wiesenfeld took further X- rays and gave him another appointment 3 weeks later for December 1, 1977. 254/ According to Santiago he requested "some papers" from Dr. Wiesenfeld to bring to the Respondent but because of the language barrier, since neither Dr. Wiesenfeld nor his secretary speak Spanish, Santiago believed he was told by the doctor's secretary "that the company knew about it." He added that on November 10, 1977, that same day, he received a telegram from the Respondent informing him that he had been terminated on November 10, 1977, for the reason, "no company notification of absence."

Ruby Toomer

Ruby Toomer, an assembly line employee, testified that she sustained a fracture of her left wrist at work on January 26, 1977. 255/ Toomer continued that after she was treated at Perth Amboy General Hospital she called Ann Gere and told her that her wrist was broken and she would be out for awhile. According to Toomer, Gere asked her when she would return to work, and Toomer responded that she did not know, whereupon Gere told her "to take care of myself and keep in touch." She stated that she returned to the Respondent's plant 2 days later on January 28, 1977 to pick up her paycheck and while there spoke to Ann Gere and Bob Gagas, advising them that she did not as yet know when she would return to work. 256/ The record shows that Toomer thereafter reported to the Respondent's

254/ Santiago testified that upon his return to Dr. Wiesenfeld on December 1, 1977, Wiesenfeld examined him and told him that his treatment was completed.

255/ Toomer also testified that during her employment with the Respondent she had previously fractured the same wrist in a car accident on August 14, 1976 and thereafter remained away from her job until November 1, 1976 when she returned to work.

256/ Toomer testified that she had a cast on her left wrist and arm from January 26, 1977 until the "second or third week of March /1977/."

personnel office once a month to fill out "lost wages forms . . . for my insurance company." 257/

Toomer related that she signed an authorization card for Local 222 on April 11, 1977, joined the strike and started picketing sometime during the first week in May although she was then able to return to work but had decided instead to support the strike. She stated that while on the picket line one day, Ann Gere drove by her into the plant driveway, she being "about 3, 4 feet" away from Gere at the time. Toomer continued that on September 13, 1977 she entered the hospital because she had a tumor on her pituitory gland. 258/ She added that while there, her sister Shirley Bagby advised her that the strike had ended and gave her an employment application which the Respondent required of all the strikers preliminary to their being considered for reemployment at Conair, which Bagby gave to the Union after Toomer completed it. The Union included Toomer's name in the offer to return to work it made to the Respondent on behalf of the strikers. 259/

The evidence herein shows that by letter dated October 5, 1977, Mayorek stated that Toomer would not be reinstated for the following reason:

> 3. Ruby Toomer - Started on 3/25/76. Went out on disability on 1/31/77 prior to strike action. Conair has never heard from her as to her intentions to return to work. / 260/ _/

Toomer testified that at the end of October 1977 she received a "telegram" from the Respondent, "to come back to work on November 2nd, 1977." She continued that she called the Respondent and spoke to one of the personnel department "girls" informing the employee that her doctor had told her that she was unable to return to work at that time. Toomer added that the "girl" "told me when I go to the doctor, to let them know." According to Toomer's testimony her doctor, Charles Kalko, M.D., sent a letter to the Respondent on November 2, 1977, which stated:

> Ruby Toomer has been under my care since February 22, 1977. I feel that she is totally disabled and will not be able to return to work

257/ General Counsel's Exhibit 24 shows that on September 21, 1977, Marjorie Pinto, a personnel department clerical employee at Conair, entered the following information on one of the wage verification forms concerning her dates of employment as: "From 3/26/76 through: Present."

258/ Toomer stated that sometime during the first week in August 1977, she telephoned the Respondent's personnel department to inquire about her vacation pay and was told by the personnel manager that she would have to return to work and "work six weeks and then I was entitled to my vacation pay."

259/ See Respondent's Exhibit 2.

260/ See General Counsel's Exhibit 60.

Q. Were you surprised by the outcome of the election?

A. Nothing--yes, I--no. I kind of knew we were going to win.

Zadroga also denied ever hearing any talk among the employees about the plant closing down and moving to Hong Kong if the Union won an election. 300/

Arthur Marin 301/ testified that Zadroga actively campaigned against

> Of the two persons out on disability one, Martha Davidon (sic), has come back. The other, Ruby Toomer, has not. /263/

Toomer testified that on Thursday, January 12, 1978, Dr. Kalko advised her that she could return to work on Monday, January 16, 1978, and gave her a letter to this effect to give to the Respondent. 264/ Toomer continued that on January 13, 1977, she telephoned the Respondent, speaking to "one of the girls in personnel" and advised her that she "wanted to come back to work." She added that she was told that "they were out on vacation or something" and "to call back in a couple of days." Toomer related that when she again telephoned the Respondent on Monday, January 18, 1978, she was told by "one of the girls in personnel again" that she would have "to see the personnel manager to get the okay from him" to return to work, but that he "wasn't in." Toomer stated that she then left her name and telephone number with the girl and requested that the "personnel manager" call her "when he comes in." Toomer indicated that hearing nothing from the Respondent for "a whole week" she again telephoned the Respondent's personnel department on Monday, January 25, 1978, at which time after giving her name to "the girl in personnel again" she was told that she had been terminated.

261/ Toomer testified that Dr. Kalko had given her a copy of the letter sent to the Respondent. This letter was received in evidence as General Counsel's Exhibit 25. It should be noted that the letter is addressed "To Whom It May Concern.

262/ See General Counsel's Exhibit 71.

263/ See General Counsel's Exhibit 70. Concerning Martha Davison, an assembly line employee, who is also Ruby Toomer's sister, Davison testified that she went on maternity leave on January 13, 1977. Toomer testified that on that day Davison had asked her to accompany Davison to Bob Gagas' office for the purpose of discussing Davison's maternity leave with him. Toomer stated, "I went into the office with her and she asked him when she leave to go on maternity leave, when she come back will her job be available and he told her yes, it would." Davison testified similarly. As asserted by the Respondent in its brief:

> In the case of Martha Davison, the company did reinstate her on November 2, 1977, despite the fact that she had been released for medical reasons . . . prior to the strike. She therefore did not have the status of an employee which would have entitled her to reinstatement.

264/ This letter is also addressed "To Whom It may Concern" and Toomer never testified that she delivered it to the Respondent.

Arthur Marin, the Respondent's personnel director, testified that Toomer was discharged at the end of September 1977 because she failed to return to work "within three weeks from the time that we spoke to the doctor," 265/ and for "failure to contact the company." Marin at first stated that Toomer had been notified by the Respondent about her discharge but later admitted that he was not sure that this had happened. 266/ However the record reflects that a review of Ruby Toomer's personnel file failed to disclose evidence of such notification, and no letter or telegram supporting the alleged notification was ever produced at the hearing.

Carmen Sagardia

Carmen Sagardia, an assembly line employee, testified that she signed an authorization card for Local 222 on April 11, 1977, joined the strike when it began on that day, picketed during the strike until it ended on September 23, 1977, reported for work on September 28, 1977, filled out an employment application form for the Respondent after she was denied reinstatement on that day, and returned to work on October 4, 1977 pursuant to a mailgram from the Respondent advising her to do so. She continued that she worked until Friday, December 30, 1977, at which time she and all the rest of the production employees were given 2 weeks vacation.

Sagardia related that she did not return to work on Monday, January 16, 1978 as scheduled because her aunt, who lives with her and takes care of her young children, entered the hospital the previous Friday, January 13, 1978 due to an asthma attack. She stated that she telephoned the Respondent on January 13, 1978 and spoke to Arthur Marin advising him about her inability to report for work and the reasons therefor. According to Sagardia, Marin told her to call him again when she was ready to return to work. She added that her aunt remained in the hospital for two weeks and convalesced at home for a period of a few weeks thereafter during which one of Sagardia's sons became hospitalized with pneumonia.

Sagardia testified that due to the above she was unable to return to work until February 23, 1978 when she telephoned the Respondent on that day asking to speak to Marin but was unable to do so. Sagardia stated that later in the day at about 1:00 p.m. she went personally to the Respondent's plant and met with Marin. She related that she asked for her job back but was told there was no job opening for her, and she left her telephone number with him and asked that he call her when a job became available. Sagardia added that she never heard from the Respondent thereafter.

In connection with the above John Mayorek testified concerning the Respondent's "leave of absence" policy that leaves of absence were "up to his or her immediate supervisor" and if the leave of absence is committed to and approved, then "there is no problem in reinstating that person after the leave of

265/ Dr. Grove, who initially treated Toomer prior to her treatment by Dr. Kalko, had advised that Toomer could return to work within the 3-week period.

266/ Marin also testified that "she [Toomer] was probably notified by letter or telegram in accordance with company policy."

absence." Further, respecting the Respondent's policy on discharging employees, Arthur Marin testified that failure by employees to notify the Respondent of the reasons for their absence doesn't automatically result in discharge: "We always give the employees the benefit of the doubt." Additionally paragraph 14 of the Respondent's personnel manual provides:

> 14. Leave of Absence
>
> When you need extended time away from the Company because of illness, pregnancy, etc. or other good cause, discuss the matter with your supervisor. The Personnel Department will consider your request for a leave of absence based on your length of service with us, previous requests, attendance, job performance, the time requested and your reason.
>
> At the end of the permitted leave, you are entitled to rejoin our staff at the same rate of pay as when you left. You are not guaranteed the same job. All the employee benefits are suspended during this period. / 267/

Changes In Conditions of Employment During and After the Strike

Cafeteria Service

According to the testimony of General Counsel's witnesses, Florence Jacko and Lucille Allen, the Respondent's cafeteria service consisted of food vending machines and two microwave ovens prior to the commencement of the strike. Jacko testified that when she returned to work following her reinstatement on October 4, 1977, the Respondent was in the process of rebuilding the cafeteria to provide its employees with hot food service therein. Both the above witnesses and another of the General Counsel's witnesses, Noraima Mendez, additionally

267/ In connection herewith, the testimony of Lucille Barsi and Georgina Echevarria is enlightening. Both these employees were called as witnesses for the Respondent and admittedly do not support Local 222. Barsi testified that she did not work from September 15, 1977 and thereafter for 7 weeks due to illness; that she initially notified her supervisor and Marin's secretary that she would only be out for 2 days; that she called Marin's secretary from the hospital and told the secretary that she would be out for a longer time than previously indicated and was in turn told by the secretary that when she was ready to come back, she should notify the company and return to work. After Barsi obtained a "doctor's release," she brought it to the Respondent and was returned to her job. Barsi also testified that she was aware that from time to time employees had been out sick and they subsequently returned to their jobs and that this was a well known policy of the Respondent's. Echeverria testified that she was out of work due to illness during the 3 months preceding the strike and that she returned to work without any problem on April 11, 1977.

testified that hot food service in the cafeteria commenced sometime in November 1977, 268/ and that prior to the commencement of the Union's organizational activity in March or April 1977, no one at Conair had mentioned anything to them about the possibility of hot food in the Respondent's cafeteria. Further Jacko and Allen also related that they first were told about the Respondent's intention to install hot food service in the cafeteria when Mayorek made this statement at the April 4, 1977 meeting when he addressed the Respondent's unit employees.

Concerning this "Lee" Rizzuto, the Respondent's president testified that, "Actually we spoke about it at the end of '76, and we were getting written proposals from various vending companies and cafeteria-type operations to utilize and to install a hot food cafeteria in the plant." 269/

Promotions from Within by Bidding for Jobs

Lucille Allen testified that she first heard about the Respondent's policy of employees bidding for jobs after her return to work on October 4, 1977: "I heard employees talking about it and they said that they had to bid for different jobs, put their name on a list, it would be posted up on the bulletin board and then they would select the people from the list." Allen, Florence Jacko and Noraima Mendez all stated that the first time they learned about this was after they returned to work following the strike. Allen and Jacko further testified that as far as they knew there was no policy or system of bidding for jobs by employees before the strike started on April 11, 1977.

Arthur Marin, the Respondent's personnel director, related that in or about the time of his hire on June 1, 1977, he discussed with Rizzuto "contemplated changes in the programs of the company . . . Mr. Rizzuto felt that I could make some corrections in payroll, in personnel, changes in policy. . . . I was asked to study and make my suggestions and recommendations to--on the subject." Marin's testimony continues:

> Q. (By Mr. Burstein) Now, between June when you started and the date of--let's say the end of 1977 were any changes implemented in wages or hours or other terms or conditions of employment which you initiated?
>
> A. Yes, there were many changes made during that time from June to December.
>
> Q. What kind of changes?
>
> A. The first change that we made was to institute a system of promotions from within by bidding. In other words, the employees can

268/ From the testimony of the above witnesses it appears that the Respondent's cafeteria service now consists of tray service with a choice of hot or cold food, sandwiches, salads, and beverages, with a cashier and approximately four female employees working behind the counter serving the food and making sandwiches. There is also a daily menu with a choice of food.

269/ The Respondent did not produce any of these written proposals nor did it submit any other evidence concerning this.

> bid for a job so that in this manner whenever there is a vacancy any employee in the company can bid for a higher rate. Then they will be interviewed by a supervisor.

While Marin stated that the Respondent did have a system of promotion from within prior to his hire, he admitted that it was not on any "formalized basis" and the change to a formal procedure of promoting from within was implemented soon after he became the personnel director in June 1977.

Rizzuto testified similarly stating, "Well, part of it was, you know, already being employed in the company, you know, prior to '77 maybe not in the total sophisticated basis, but bidding was occurring, not only in the factory personnel, but also within the office area. . . ." Rita Saulino, an employee, testified that she had transferred to the Respondent's quality control department after May 1977 and had received the transfer by signing her name "to a memo on the bulletin board" listing the job.

Formalization of Termination and Layoff Procedures

Marin testified that the Respondent "instituted the system of having forms for terminating people, for promoting people, for layoffs. The idea was to avoid the possibility of any unfair approach by a supervisor. We instituted the procedure of not allowing termination of employees unless the termination of the employees was documented," and that this occurred after he became the personnel director. According to Marin this system provided for the documentation of any reasons for the termination of an employee. Concerning this Rizzuto, aside from making references to the Respondent's "employee manual," added little to the above. As described hereinbefore it should be noted that at one of the meetings held by the Respondent with groups of its employees on April 6, 1977, a complaint had been raised by one of the employees that a fellow worker had been discharged unfairly.

Standards for Salaries and Performance Ratings

Marin testified that since his hire as personnel director,

> The matter of salaries, we have been trying to set up standards for--on the basis of jobs rather than on the basis of individuals, so that for secretaries we are trying to set up standards and we set up standards for all the employees and also studies about the executive salaries . . . . We also set up a matter of a performance rating where the employees are rated by the supervisor and it becomes part of the record so that in case of layoff or promotion you can utilize those performance rating criterias as one of the considerations.

According to Marin the grade analysis and hourly wage rate changes were implemented sometime in June 1977 soon after he became the Respondent's personnel director on June 1, 1977.

Rizzuto testified that employee "salary scales have been increasing, you know, since we came to Edison, which is back now 2 years, based on seniority and productivity and the individual's capability of doing, you know, a more important job for the company." When asked if, between June 1st and December 1, 1977, this changed in any way he responded, "In reality, it was the same program except we may have given it a different heading or become a little more sophisticated on how we handled it, but basically it was the same." Again it should be noted that this was one of the areas raised as a grievance by employees at the meetings held by the Respondent during the week of April 4, 1977 with its employees.

Allocation of Parking Spaces Based on Seniority

Marin testified, "We have set up a system of parking to eliminate the confusion that existed previously by allocating--allocating parking places on the basis of straight seniority." Marin stated that this change was implemented in September 1977 and came about "as a result of complaints by employees concerning the inadequate parking facilities." 270/ Rizzuto testified, "Yes, we did have a system or more formal system put through as far as with parking areas and the assignment of given spaces because as the working force enlarged, we did have some sort of confusion as to, you know, specify parking area for key people--for every individual attending." Rizzuto added that he believed this system was instituted in January 1977, ". . . but we did have somewhat of an informal system prior to that."

Conair Newsletter

Employee Florence Jacko testified that prior to the Union's organizational drive the Respondent did not have a newsletter nor had she ever seen a Conair newsletter prior to the strike. Marin testified that the Respondent "instituted a newsletter on a monthly or bimonthly or a regular basis," in either June, July or August of 1977. Rizzuto testified that the newsletter had been published "a couple of years as far as I know," and distributed to all of the Respondent's employees. 271/

Credit Union

Marin testified that another change in the employees' terms and conditions of employment was the establishment of a credit union for the employees. Rizzuto testified that while he spoke to the Respondent's corporate counsel Walter Margolies, about the Respondent's qualifications for such a credit union prior to June 1977, he was unsure whether a credit union actually existed at Conair at the time he testified.

270/ Marin testified that the Edison police had given the Respondent "four warnings" to have the employees refrain from parking on the street or the police would "have everybody ticketed."

271/ Counsel for Charging Party proffered into evidence a Conair newsletter dated "January--March, 1978." The Respondent offered no earlier dated copies of the newsletter as evidence herein.

Social Clubs

Marin testified that between June and December of 1977, social clubs for bowling, skating and baseball were organized for the employees and became functional.

Improved Safety Procedures

Marin also testified that, "We tried to provide improved safety procedures in case of an employee getting hurt. We hired a nurse, an RN who happens to be bilingual . . . and I walk around the plant every day to see whether we are violating any safety rules and to bring it to the attention of the supervisors. . . ." He stated that the improved safety procedures were initiated in July or August 1977 and that the bilingual nurse was hired in October 1977. Rizzuto testified that the Respondent had safety standards on the job since the Respondent first commenced operations as required by state law. He also testified that the Respondent "did have a nurse at one time" in 1976 or early 1977 272/ and that John Mayorek, who had training in first aid techniques, would assist her or himself administer to injured employees.

Informational Meetings with Marin and Mayorek

Marin testified that another change in the employees' terms and conditions of employment between June 1977 and December 1977, was the institution, by the Respondent, of a system whereby "any group of employees" having questions concerning "the possibility of lay offs or what we believe is going to happen for--in case we need more products, the overtime practices, this type of thing," can have an "informational meeting with myself or Mr. Mayorek." Marin added that this system of informational meetings was initiated in November 1977.

Marin also indicated that, "Yes, we started a system of an open door where whenever an employee has difficulty or he or she comes to see me and if in my judgment his complaint is valid, I will talk to the supervisor and at my discretion I can override the supervisor. . . ." A full discussion of the Respondent's "Open Door Policy" and its "Grievance Committee" appears subsequently herein.

Holidays on Birthdays

Marin additionally testified that the Respondent instituted a policy of giving employees their birthdays off as a holiday.

While not connected therewith he additionally testified that the Respondent instituted training sessions for its management and supervisory

272/ Marin testified that the previous nurse employed by the Respondent was not bilingual.

personnel including forums on "principles of supervisor training, the importance of following proper procedures, the EAE and the marketing principals." 273/

Post-Strike and Pre-Election Occurrences

Threats of Plant Closure

Rosaria Machin 274/ testified that on or about October 17, 1977, while working on the assembly line she asked "an inspector called Rita" if she knew anything about the representation election which Local 222 had told the employees was to be held on October 29, 1977. Soon thereafter Jerry Kampel came to the line and asked her to follow him into John Mysek's office 275/ where he told her that he had been informed by Rita that Machin was telling everybody that there was to be an election on October 29, 1977. Machin stated that she denied this as a "lie" and told him that Local 222 had informed her there would be an election whereupon Kampel responded, "that he feel sorry for everybody if we got elections because Lee Rizzuto going to take the company to Hong Kong if we got elections . . . and the union won." Machin continued that she said to Kampel, "I think that we need a union here, and he told me, 'Well, that's all I need from you, you can go back to work.'" She added that Kampel had never spoken to her alone like this before this instance. Kampel denied any recollection of having spoken to Machin in the factory area after the end of the strike.

Machin testified that approximately one week before the representation election held by the Board on December 7, 1977, Ann Gere came over to where she was working on the assembly line and asked her "if it's true that we're going to have election." Machin responded, "Well, you know better than we, because I think you got the papers in the office." She stated that Gere told her, "Rosaria, I feel sorry for all the people in the company, because if they got an elections and they won, Mr. Rizzuto going to take the company to Hong Kong and all of you going to lose their jobs." Gere denied ever making the above statements to Machin.

Machin stated that in and around this time she also had a similar conversation with Rosa Cruz, a line supervisor, since at the time she was being switched to various assembly lines to work under different supervisors. 276/ According to Machin, Cruz asked her if there was going to be an election held and when she answered that she guessed so, Cruz told her that if Local 222 won the

273/ Marin stated that "group leaders" were included in the "supervisory training program."

274/ Machin was reinstated to her former assembly line job on October 12, 1977. She speaks English, although with some difficulty.

275/ Mysek is the Respondent's Quality Control Manager, but he was not present during this conversation.

276/ Machin testified that one of the line supervisors, "Richie," told her that she was being moved around to different assembly lines because "I was on a strike." She stated that prior to the strike she had worked only on Ann Gere's assembly line since her hire.

election, Rizzuto would "take the company to Hong Kong" and that "200 and 230 or something workers" would lose their jobs. 277/

Machin related that she additionally had a similar conversation with Naomi Rodriguez, another line supervisor, 278/ during which Rodriguez reiterated that if Local 222 won the election the plant would move to Hong Kong and everyone would lose their jobs. She added that Rodriguez said, "I hope you don't have elections, because Mr. Rizzuto swear to his father before he died that he never going to let any kind of union enter in his company--not this union--any union; and I feel sorry for all these people if they got elections and they won."

Machin continued that a day before the election, she overheard George Zadroga, employed by the Respondent as "an inspector," 279/ tell another employee, Rafael Valdes working next to her, that if Local 222 won the election Rizzuto was going "to move the company to Hong Kong because its less expensive for him in Hong Kong. . . . I feel sorry for all of you if you won the elections, because you're going to lose your jobs." She also testified that she heard Zadroga say the same thing to other employees while he "was working all over the place and around the lines and telling everybody."

Evelyn Lee testified that after her reinstatement on or about November 2, 1977 to her job in the service department and prior to Thanksgiving, she heard her departmental supervisor, Les Price tell another employee, Coleen /Pierra/ 280/ that, "if the union got in, the company will move to Hong Kong. 281/ Lee also stated that on the Monday or Tuesday preceding the election

277/ Significantly, Cruz admitted that it was known by her and others at the plant that Machin actively supported Local 222.

278/ The General Counsel asserts that Naomi Rodriguez was a supervisor within the meaning of Section 2(11) of the Act, at all times material herein. While Rodriguez did not herself testify at the hearing, Mayorek in effect admitted that Rodriguez was a line supervisor as of the week ending April 9, 1977. See General Counsel's Exhibit 102 and John Mayorek's testimony on page 9,005. Further, the testimony of Irvin G. Rosen, a cost accountant employed by the Respondent, and that of Rosaria Machin, Georgina Echeverria and Florence Jacko, all employees of the Respondent, clearly shows that Rodriguez functioned as a line "floorlady," holding the same position as Rosa Cruz, an admitted line supervisor, with Rodriguez directing the assembly line employees on her line in the performance of their duties.

In view of the above I find and conclude that Naomi Rodriguez, at all times material herein, was and is now a supervisor within the meaning of Section 2(11) of the Act, and was and is now an agent of the Respondent acting on its behalf.

279/ The General Counsel asserts that Zadroga is an agent of the Respondent within the meaning of Section 2(13) of the Act, acting on its behalf.

280/ Price testified that Pierra is a group leader in the service department.

281/ Although Price testified as a witness for the Respondent he did not deny making this statement. He did however testify that on occasion he had discussed with Pierra products which the Respondent imports from Hong Kong.

she saws signs posted on the ladies' room door and on the bulletin board outside the cafeteria which stated, "Vote no, move to Hong Kong."

Florence Jacko testified that approximately one or two days before the election she observed Ann Gere distributing "papers" or "stickers" that said "Conair, si; Union, no," to a group of employees on the assembly line or somewhere in the production area, at which time she overheard Gere state that, "It would be no problem at all to move out of there because that's only a warehouse, and they could pick up and get out of there very easily." Jacko added, "I don't know whether someone asked a question but I did hear her answer. . . ."

Jacko also testified that she had two conversations with Rosa Cruz during the 3 days prior to the election, the latter conversation occurring 1 day prior thereto. A discussion concerning the replacement employees' desire to vote in the election led Jacko to ask Cruz if she really thought Rizzuto would close the plant and move it to Hong Kong if the Union won, whereupon Cruz answered that she did "because he had lots of money and he could do anything he wants." Cruz generally denied having any conversations with employees concerning Conair's move to Hong Kong.

Lucille Allen testified that approximately 2 weeks prior to the election, Ann Gere "had come over to the table where I was working and present was Laura Martinez and Carmen Sagardia, and she said that it would be no problem to move everything out of the factory and to move away and that she didn't want to lose her job." Allen also testified that about 3 days before the election she observed a sign on the wall "next to the ladies' room" which said, "Vote for the union and move to Hong Kong and make five dollars a week." Gere denied having any discussions with Allen concerning Local 222 or about anything else since Allen, "is an extremely quiet person. She doesn't talk to hardly anyone."

Laura Martinez, an assembly line employee, 282/ testified that about 2 days before the election, Ann Gere told her that "she was too young to retire . . . because if the union win, the company don't cost nothirg to pack everything and move--leave." She related that the next day Gere reiterated her belief to Martinez that she would lose her job if Local 222 won the election because the Respondent would then move the plant to Hong Kong. Martinez added that Lucille Allen and Carmen Sagardia were present when this occurred.

Martinez continued that approximately 1 or 2 weeks before the election her supervisor, Rosa Cruz, spoke to her "a couple of times" telling her that "if the union win, the people going to lose the Christmas bonus. And I told her they not going to lose nothing, and she say no Labor Board, no union, nobody can make the company give the bonus because that's the gift the company do it to the employees." Martinez added, "She say before the election, if the union win, the company they going to move to Hong Kong . . . soon lot of people have to go to the unemployment office." Martinez stated that this conversation took place while

282/ Martinez was reinstated on October 4, 1977. At the time she testified herein, she was still employed by the Respondent.

she was working on the assembly line and that she heard Cruz repeat this to "about 10 or 15 people . . . a couple of days before the election." Martinez related that after the Union lost the election, Cruz cried and said to her that "she was too happy because in that way, nobody lose a job."

Martinez also testified that she had observed various signs up in the plant prior to the election, "one in the ladies' room . . . one in the board, the main room . . . one on the door to the warehouse . . . another one on the wall to the cafeteria, outside," setting forth the benefits which the Respondent's employees currently enjoyed, such as holidays, insurance benefits, vacation, etc., and one sign which said, "the company going to move to Hong Kong, something like that," and another reading, "any employees who belong for any union, they don't going to give the bonus." 283/ She added that these signs or posters were printed in both English and Spanish.

Carmen Sagardia, another assembly line employee, testified that she works near Laura Martinez and Lucille Allen on the assembly line supervised by Rosa Cruz and that "about two or three days before the election," Ann Gere approached Martinez on the assembly line and told her that, "she didn't want to lose her job because if the union wins they would move the company to Hong Kong." Sagardia added that she observed that Gere showed Martinez a picture of Gere's family at the time. 284/

Sagardia related that approximately 1 week before the Board's election on December 7, 1977 she heard Rosa Cruz tell Martinez on three or four occasions during that week that if Local 222 won the election the Respondent would move its plant to Hong Kong. She also stated that Cruz had said that "the labor board or no one could force them to give the Christmas bonus." Sagardia added that during the same period of time, approximately 1 week before the election, she observed various signs, "one by the time clock and one by the ladies' room and a poster by the office door." According to Sagardia, the sign by the ladies' room was posted on the door and read, "VOTE NO OR MOVE TO HONG KONG;" 285/ the sign by the timeclock stated, "vote no for the union and yes for Conair;" and

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283/ Martinez testified that she received a Christmas bonus of $25.00 in 1976, and a bonus of $105.00 for Christmas, 1977.

284/ Interestingly, and applicable to the above, Martinez testified that after Gere had told her that the Respondent would move its plant to Hong Kong if Local 222 won the election, resulting in Gere losing her job, and after Martinez suggested that Gere could relocate and move along with the Respondent to Hong Kong and work there, Gere stated that she and her son wanted to go but her husband did not and "she doesn't want to lose her husband because he is a nice looking man--he is a nice guy." Martinez related that she then told Gere that the Respondent might not move to Hong Kong whatever happened whereupon Gere responded, "Before I don't believe, now I do."

285/ See General Counsel's Exhibit 21. Dorothy Lodato, Alice Jones and, as hereinbefore stated, Evelyn Lee all testified as to having seen such a sign posted near or on the ladies' room door.

a large sign near the office which stated, "people that belong to any kind of a union they won't get their Christmas bonus." 286/

Dorothy Lodato, an assembly line employee, testified that "within the two weeks before the election" she heard Ann Gere say that, "Mr. Rizzuto will not accept the union; he will close the doors first." She added that she was walking towards Gere's desk when she heard this and that there were fellow employees around her desk when Gere made the statement.

Gere generally denied making any of the above statements, 287/ as did Rosa Cruz. Cruz testified that during the 2 or 3 weeks preceding the election no employee had asked her any questions about Hong Kong but there "was a rumor around the company . . . everybody was talking, but nobody come to me and ask me question about it." She stated that she heard these rumors "just about every day," and that everyone was concerned about it. 288/

Flora Kurtanick, 289/ testified that starting with the first day of her return to work on October 4, 1977 and subsequent thereto, George Zadroga told her on several occasions that Rizzuto "had a lot of pride and he would move his business to Hong Kong." She stated that on some of these occasions Joseph Marano, a supervisor, accompanied Zadroga and concurred with Zadroga's remarks. 290/ She related that Zadroga had also told her on one occasion when Marano wasn't present, and after teasing her about the union, that "I don't care about the union anyway, . . . because I'm going to be part of management pretty soon." Kurtanick added that during the last week prior to the election Zadroga not only stated that Rizzuto would move the plant to Hong Kong, but that he also told her to "vote no" against Local 222. She related that Zadroga had given as Rizzuto's reason for the possible move that "he didn't want your goddamn union in." (Kurtanick also testified that on one occasion approximately 1 week prior to the election, George Zadroga approached her while she was working on the assembly line and told her "Hey, your girls just turned in their badges to me; I

286/ Sagardia testified that this latter sign had other things written or printed on it but she only read the "bonus" part.

287/ She testified that she was on vacation during one of the weeks prior to the election on December 7, 1977. The parties stipulated that Gere was on vacation from November 21 through November 25, 1977.

288/ Cruz testified that she first heard the rumors concerning plant closure on April 12 or April 15, 1977, but could not name any employee whom she heard discussing it. Also, as indicated hereinbefore, Cruz denied ever having talked to any employee at any time about the Union or the election and that these subjects had never come up in all the time that she worked at Conair.

289/ Kurtanick an assembly line employee, was reinstated by the Respondent to her job on October 4, 1977 and is currently employed by the Respondent.

290/ Kurtanick testified that after Zadroga made these remarks to her he would say to Marano, "'Isn't that right, Joe.' And Joe said, 'Yes, he would.'" However she also testified that this occurred only during the week prior to the election when Zadroga, sometimes accompanied by Marano, would stop and stand behind her at her place in the assembly line and repeat this statement.

threw them on the desk in the office." Kurtanick continued, with respect to these badges, that Zadroga told her that he had persuaded some of the "young girls," who supported the Union, to take off their badges. Kurtanick explained that these were union badges with the phrase "vote union" inscribed thereon.)

The "Raffle Tickets"

Kurtanick testified that on the day before the election, Zadroga had "come up to me laughing" and showed her a "raffle ticket," which she thought was "very witty" and consequently asked him for it, whereupon he gave the ticket to her. Kurtanick stated "Well, he kept laughing, and I asked him who had made it. He says, 'I can't tell you that.'" 291/ The record herein shows that this document also referred to by various other witnesses as hereinafter set forth, is similar in nature and size to commonly used raffle tickets and states therein:

NAME _____
ADDRESS _____
CITY & STATE _____
TELEPHONE # _____

No. 063-078-088

WIN AN EXCITING ALL EXPENSE PAID
TRIP TO CONAIR'S NEW FACILITIES
IN BEAUTIFUL HONG KONG
DONATION: ONE UNION VOTE

Concerning the above conversation involving the "raffle ticket," Alice Jones, 292/ another of General Counsel's witnesses, testified that sometime within the 2-week period before the election, she had observed Zadroga and Marano talking to a female employee. She related, "They had the ticket . . . they was talking about a ticket." Although Jones indicated that she could not hear what was said she stated, "No. Something about you vote no, you go to Hong Kong. After they left, I asked the girl, 'Can I see the ticket?' I saw it, and gave it back to her." She added that "people had them around the factory."

Additionally with regard to the "raffle" or "lottery ticket," various other witnesses for the General Counsel testified to having observed these "raffle tickets" in and around the Respondent's plant in the cafeteria "on a table" or being carried around by employees.

291/ Kurtanick testified that on that day she had not observed any "raffle tickets" in the cafeteria but that a fellow employee had shown her one either during her 10 a.m. break or during lunchtime.

292/ Jones was reinstated by the Respondent on October 19, 1977.

Rosaria Machin testified that she saw Zadroga give an employee named Rafael Valdes "some paper" approximately 2 days before the election and identified General Counsel's Exhibit 10 as being similar to the "paper" which Zadroga handed to Valdes and which Valdes then showed to her. 293/ Valdes testified that he was given a "raffle ticket" by someone named George, an inspector, who patted him on the shoulder at the time. He stated that this incident occurred during the 2-week period prior to the election. 294/

Adamina Nieves testified that 2 or 3 days prior to the election she saw George Zadroga give a "raffle ticket" to fellow employee Rafael Valdes, this occurring before lunchtime and on the assembly line where they were working. She stated that she observed Zadroga handing out raffle tickets "all throughout the line" and that he gave them "to many people." Nieves added that she saw many of these tickets situated on a cafeteria table, 2 or 3 days prior to the election, and that "everybody" was talking about them among the employees. 295/

Carmen Sagardia testified that 2 days prior to the election, when she and other assembly line employees went to the cafeteria on their morning break, she saw "raffle tickets," on all of the tables there, "about 15 on the table I was." She stated that she took two of the tickets and gave one of them to the Union.

Florence Jacko testified that a day or two prior to the election she noticed "some papers" lying on a table in the cafeteria during either a 10 minute break or at lunchtime and that these were "a raffle ticket for a trip to Hong Kong for one union vote." 296/ Jacko continued that Ann Gere was standing in the aisle at the front of the table when this occurred and after she "picked up the paper" and read it she handed the raffle ticket to Flora Kurtanick who returned it to her after reading it. 297/ She added that she ultimately gave the raffle to Dorothy Lodato to read while they were both at the union hall.

Dorothy Lodato testified that approximately 1 week prior to the election, while she was passing Ann Gere's desk on her way to the ladies' room, she saw Gere distribute "two or three of the raffles" to employees "standing around" Gere's desk and that Gere was laughing as she was handing them out.

293/ Machin testified that she and Valdes were working on the assembly line together at the time. She also stated that the day prior to the election she saw "raffle tickets" on one of the tables in the cafeteria. Machin added that she observed no other supervisors with these "raffles."

294/ Valdes is currently employed by the Respondent as an assembler and repairman, having been reinstated to his job on October 14, 1977.

295/ Nieves additionally testified that she had seen Zadroga handing out "raffle tickets" prior to the time she saw them in the cafeteria.

296/ Jacko identified General Counsel's Exhibit 10 as the "papers" she saw in the cafeteria.

297/ Kurtanick testified that during her lunch period "the woman that she eats lunch with" showed her a "raffle ticket" and she told her friend that it was "pretty good."

Lodato added that she also heard Gere "joke" about the raffle tickets while Gere was passing Lodato on the assembly line. 298/ She stated that fellow employee Florence Jacko subsequently gave her a "raffle ticket" to read at the union hall.

Laura Martinez testified that approximately 1 or 2 days prior to the election, she saw "raffle tickets" while she was in the cafeteria during her lunch break, at approximately 11:30 a.m. Martinez added that she also saw approximately 10 or 15 employees carrying these raffle tickets. Additionally employees Martha Davison and Elsie Vega testified that they had seen "raffle tickets" lying on the table in the cafeteria. Another of the General Counsel's witnesses, Luz Melindez, testified that a few days before the election she saw a "raffle ticket" while she was working on the assembly line and that "this paper was going down the line together with the work."

The Respondent proffered the testimony of George Zadroga who testified that he is employed by the Respondent as a "roving inspector" for the quality control department, his duties requiring that he inspect the products being manufactured on the various assembly lines he is assigned to and to report any problems to his supervisor, Joseph Marano. Zadroga denied that during late November or early December 1977, just prior to the election, other employees asked him "anything about the union," or that he spoke to any of them about it. Zadroga particularly denied knowing Rosaria Machin or having had any conversations with Flora Kurtanick about Local 222. He also denied telling any employee that the Respondent's plant was going to close and be moved to Hong Kong if the Union got in. Concerning the "raffle tickets," Zadroga stated that he saw them "in the factory area, in the cafeteria. They were floating all around, . . . when I walked in there one day and everybody was holding them, everybody had them, they were through the whole cafeteria." He additionally denied knowing where the "raffle tickets" came from, who had made them, and giving either Rafael Valdes or Flora Kurtanick a "raffle ticket." He also denied discussing the "raffle tickets" with them. Zadroga maintained that he had not campaigned against Local 222 although he admitted that he voted against Local 222, and wanted to see the Union defeated in the election, relating that he felt that "this Union wasn't any good." 299/ Interestingly, on cross-examination, Zadroga was asked:

298/ Lodato testified that Gere in substance said "more or less that if anybody wanted to take a trip just take one of these tickets and go to Hong Kong."

299/ Zadroga testified that on one occasion, in the summertime, when his wife had picked him up from work, the pickets had thrown rocks at his car and upon his returning home he stopped in front of the house of one of the striking employees named "Rufino" and asked why "Rufino" had thrown rocks at his wife and at his car. Zadroga continued that, "He threw a punch at me, so I hit him back." It seems that this occurred in the same neighborhood in Perth Amboy where Zadroga and Rufino live and where the "Union hall" is located so that according to Zadroga "eight people" came out of the "Union hall" at this time and attacked him "with belts and sticks." Complaints were filed by both Zadroga and Rufino charging each other with "assault" after the police arrived on the scene.

Q. Were you surprised by the outcome of the election?

A. Nothing--yes, I--no. I kind of knew we were going to win.

Zadroga also denied ever hearing any talk among the employees about the plant closing down and moving to Hong Kong if the Union won an election. 300/

Arthur Marin 301/ testified that Zadroga actively campaigned against Local 222 "but not any more heavily than anybody else." He stated that Zadroga "was against the union" and had talked to many employees to try to convince them not to vote for Local 222, but "there were many employees that talked to others along those lines just as strongly as George Zadroga." Marin acknowledged that Zadroga, because of the nature of his duties, had many opportunities to speak to the Respondent's employees during the course of a workday.

Joseph Marano, 302/ the Respondent's quality control supervisor, testified that "in the latter part of November, the beginning part of December

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300/ The General Counsel contends that Zadroga is an agent of the Respondent within the meaning of Section 2(13) of the Act, acting on its behalf. The Respondent denies this. The evidence herein clearly shows that during the representation campaign, he circulated among the Respondent's employees, actively sought to persuade them to reject the Union, and this activity was at least implicitly if not expressly supported and adopted by one of the Respondent's supervisors Joseph Marano. Further from the testimony of various employee witnesses, especially that of Flora Kurtanick, which I credit, it appears that Zadroga "had a free run of the plant and could do anything he wanted . . . he was kind of favored among the supervisors" and that this was noted and observed by all the assembly line employees. As the Board stated in Community Cash Stores, Inc., 238 NLRB No. 29 (1978), "The critical issue in making this determination /whether an employee, not an acknowledged supervisor acted as a Respondent's agent/ is whether under all the circumstances the employees would reasonably believe that /the employee/was reflecting company policy, and speaking and acting for management." Thereafter in circumstances similar to what occurred herein concerning Zadroga's actions, the Board found that "Based on these factors and the record as a whole, we conclude that the employees reasonably believe that /the employee/ reflected company policy, and spoke and acted for management." Also see Pacific Industries of San Jose, 189 NLRB 933. In view of the above I find and conclude that George Zadroga is an agent of the Respondent within the meaning of Section 2(13) of the Act acting on its behalf at all the times material herein.

301/ It should be noted that Arthur Marin, as the Respondent's personnel director, would be in a position to observe and know about Zadroga's activities at the Conair plant during the period from June 1, 1977 to December 7, 1977.

302/ Marano's name also appears in the record variously as "Joseph Marane" and "Joseph Maurano." He supervises two employees, Louis Buckner and George Zadroga.

1977," employees asked him questions "pertaining to the union . . . if the place would close down if the union came in, things like that . . . but I told them I don't know anything." 303/ Marano stated that Zadroga never campaigned against Local 222 although as part of his job Zadroga spoke to employees often, adding that during November and December 1977 he had "virtually daily contact with Mr. Zadroga." He related that during his many conversations with Arthur Marin the topic of Local 222's organizing campaign would not arise too often and that Marin had told him "not to talk to the people about anything about the union." Marano added that during the month of November and the beginning of December 1977, he heard nothing at Conair "about the plant closing if the union came in". Marano continued that the "raffle tickets were all over the place" and that he saw them "in the cafeteria" and "on the assembly lines."

Ann Gere testified that she had found at least two of the "raffles" on her desk but did not know how they got there. She stated that she laughed about it, considering it a joke, and that she did not give them to anyone. However, also in this connection, employees Lucille Barsi and Josephine Torres, witnesses for the Respondent, testified that they never saw "raffle tickets" at the Respondent's plant. Further John Mayorek unequivocally denied that the Respondent had prepared or had distributed these "raffle tickets."

Additionally various of the General Counsel's witnesses testified that during an approximate 2-week period immediately preceding the election they observed handwritten signs in and about the Conair plant, in the area of the men's and ladies' rooms adjacent to the production areas. 304/ Lucille Allen testified that approximately 3 days prior to the election, she saw a sign on the wall next to the ladies' room which stated: "Vote for the Union and move to Hong Kong and make $5.00 a week." Allen stated that the sign was approximately 8 ½" by 11", written in magic marker and scotch taped to the wall. Elsie Vega testified that she also saw a sign on the wall located at the end of her assembly line in back of the production area which stated, "One Vote for the Union, One Step to the Hong Kong." Elsie Vega testified that she also saw a sign on the wall located at the end of her assembly line in back of the production area which stated, "One Vote for the Union, One Step to the Hong Kong."

303/ Marano stated that it was "usually the people that were for the Union" who asked him such questions and that he knew this because some of these employees wore union buttons and those that didn't usually were together with those who wore buttons.

304/ Lucille Allen, Flora Kurtanick, Dorothy Lodato, Laura Martinez, Rafael Valdes, Elsie Vega, Evelyn Lee, Carmen Sagardia, Martha Davison and Alice Jones. All these employees except for Allen identified General Counsel's Exhibit 21 as being identical to the handwritten sign they saw at the Respondent's plant. This sign states: "Vote No on Move to Hong Kong."

Evelyn Lee testified that during the week of the election she observed a sign on the ladies' room door and on the Respondent's bulletin board outside the plant cafeteria which stated: "Vote No, Move to Hong Kong." 305/

Rafael Valdes testified that approximately 2 weeks prior to the election he had seen a similar sign at the entrance to the bathroom which remained up until the day before the election when all the signs were removed. 306/ He stated that during the days before the election he saw such signs or papers "everywhere" at the Respondent's plant. Laura Martinez also testified that she saw similar signs 2 or 3 days prior to the election, one inside the ladies' room, and one each "outside the door of the men's room and the ladies' room," 307/ while Dorothy Lodato and Martha Davision added that they also saw such signs in the area by the ladies' room.

The Respondent's witnesses, Josephine Torres and Lucille Barsi, testified that they had never seen a sign similar to the above posted at the plant, with Barsi additionally stating that she never saw any signs at the plant which made any reference to Hong Kong. Further, John Mayorek testified that he did not know where the sign concerning Hong Kong "came from" and denied that the Respondent prepared any handwritten signs at all for posting. In view of the credible evidence herein and the fact that none of the Respondent's managerial personnel who testified herein denied seeing the "Hong Kong" sign hanging in the plant prior to the election, the testimony of Torres and Barsi is unconvincing.

Pre-Election Threats to Take Away Benefits

The Christmas Bonus

Florence Jacko testified that 2 or 3 days prior to the election, Rosa Cruz told her that it would be better if the election could take place after the Christmas holiday because the girls on her line worked very hard all year and were expecting a Christmas bonus and "she doesn't want to have them to give that up on account of the union getting into the plant." 308/ Laura Martinez testified that 1 or 2 weeks before the election, while she was

305/ Both Lee and Martha Davison testified that the bulletin board located at the entrance to the employee cafeteria is used mainly by supervisors to post notices and not used by the employees. Mayorek testified that the bulletin boards are used by both employees and management, and the Respondent, through Arthur Marin, introduced two "signs" into evidence purporting to be documents posted by employees on this bulletin board. See Respondent's Exhibits 59 and 60. However the employees who allegedly posted these notices were not called as witnesses.

306/ See General Counsel's Exhibit 21. Valdes testified that he removed the sign outside the bathroom on two or three occasions but it was put back up by someone unknown.

307/ Martinez testified that the ladies' room is utilized by both employees and by "floor ladies" like Ann Gere, Rosa Cruz and Naomi Rodriguez.

308/ It is undisputed that the Christmas bonus is a "fringe benefit" distributed regularly by the Respondent at Christmastime ever since it opened its Edison, New Jersey plant.

working on the assembly line, Rosa Cruz told her that "if the union win the people going to lose the Christmas bonus." Martinez continued that when she told Cruz that "they not going to lose nothing," Cruz responded, "no labor board, no union, nobody can make the company give the bonus because that's a gift the company do it to the employees." Martinez added that Carmen Sagardia and Lucille Allen were nearby and heard this conversation. Carmen Sagardia testified that approximately 1 week prior to the election she heard Rosa Cruz talking to Laura Martinez on the assembly line with Cruz telling Martinez that "if the union wins the employees won't get their Christmas bonuses. . . . the Labor Board or no one could force the company to give the Christmas bonus." 309/ Rosa Cruz denied saying anything to the employees about the Christmas bonus during the 2 or 3-week period prior to the election.

Furthermore Noraima Mendez testified that prior to the election she saw approximately 50 professionally printed signs, measuring approximately 3 feet in length and 2 feet wide, on the walls of the cafeteria, in both English and Spanish, with one of the signs stating, "the Christmas bonuses only allowed for non-union members." Laura Martinez testified that she also saw a sign near the plant entrance approximately 2 weeks prior to the election which stated that, "any employees who belong for any union, they don't going to give the bonus . . . Christmas bonus." She stated that the sign was approximately "5 feet by 3 feet" and that she saw this sign printed in both English and Spanish. Martinez added that she saw the sign "where they have the personnel office now . . . in the plant area." 310/

Carmen Sagardia also testified concerning this stating that approximately 1 week prior to the election, she saw a poster "by the office" which stated that "the people that belong to any kind of a union they won't get their Christmas bonus." She added that she saw this poster each day during the week prior to the election and that it was a professionally printed sign.

Mendez, Martinez and Sagardia all testified that the poster which informed the employees that belonging to the Union would deprive them of their Christmas bonus was different from another large size poster the Respondent had put up. This latter poster, which had a picture of a Christmas stocking filled with money, merely informed employees that the Christmas bonus was one of the numerous benefits then enjoyed by them at Conair. 311/

309/ Sagardia testified that this conversation between Martinez and Cruz was in Spanish and that Lucille Allen also works near Martinez. It should be noted that while Lucille Allen did not testify about this conversation, Allen gave her testimony herein in English.

310/ The record indicates that the personnel office is located at the entrance to the production area.

311/ Mendez testified that the sign she saw was different from Respondent's exhibit as described above. Martinez testified that it was twice the size of this exhibit while Sagardia testified that it was wider in size than Respondent's Exhibit 6, had smaller printing and stated "other things" thereon and it did not have a Christmas stocking on it.

The Respondent's Profit Sharing Plan

John Mayorek testified that during the summer of 1977, the Respondent distributed to the employees a summary of its profit sharing plan which states therein that in order to be eligible for profit sharing, an individual has to be a non-union employee. Mayorek justified this action by stating that as administrator of the plan it is his responsibility to inform employees about the plan and about anything that could jeopardize employee benefits thereunder. However it would appear from his testimony that he could not recall any verbal or written communications to employees concerning this particular restriction prior to the Union's attempts to organize the Respondent's employees 312/ although he did point out that the Respondent's personnel manual, distributed upon hire to its employees, does contain this restriction.

Mayorek continued that it was the Respondent's usual procedure to provide those employees eligible and enrolled under the profit sharing plan with a summary or "Statement of Account" which is handed out to them during work time. He stated that the last time the Respondent provided such employees with a "Statement of Account" was during the period between November 15, 1977 and December 4, 1977. 313/ Mayorek testified that stamped on the front of the "Statements of Account" that were distributed to employees in November of 1977, in blue ink, were the words "For Non-Union Employees Only." He related that the handwritten phrase, "Union members are not entitled to profit-sharing plan" was also placed on every Statement of Account given to employees. While Mayorek stated that he personally had handed out five or ten "Statements of Account" which did not have such "notations" written or stamped thereon, he remembered giving these unmarked statements only to supervisory employees. He added that he did not know who placed either the handwritten or the stamped phrases on the "Statements of Account," although he had seen in the office the rubber stamp used to make the notation "For Non-Union Employees Only."

Mayorek also testified that on every single piece of campaign literature distributed to its employees or posted prior to the election which contained a reference to the profit sharing plan, the Respondent had included the statement that it was for non-union employees or non-union members only.

Threats to Prevent the Holding of an Election

Noraima Mendez testified that approximately 1 or 2 weeks prior to the election she overheard a conversation between Rosa Cruz and another employee, Norris Garcia, at which time Cruz told Garcia that "there was not going to be an election at Conair; that she didn't see why the employees believed there was going to be an election; and, that they lied to the employees." Mendez continued that during that same period she personally had a conversation with Cruz while in

312/ It should be remembered that Mayorek specifically told employees at the April 4, 1977 mass meeting that the profit sharing plan was available only for non-union members.

313/ Mayorek testified that as of November 1977, there were 163 employees eligible for the profit sharing plan and that all of the Respondent's employees either are eligible or could become eligible under the plan.

the ladies' room at which time Cruz told her that "there wouldn't be any election there; that Mr. Rizzuto doesn't want to have an election there and he doesn't want to have a union." Rosa Cruz denied telling any employee anything about the election or whether it would be held or not.

The Respondent's Campaign Literature

John Mayorek, the Respondent's vice president for Administration, testified that the Respondent's campaign literature was produced both in smaller size for handout or mailing to its employees and in large poster size for posting in the cafeteria and near the personnel office. He stated that the literature was prepared in both English and Spanish and was commercially produced. 314/ Mayorek added that prior to the Union's organizational campaign the Respondent had never posted similar signs in its plant informing its employees of their benefits at Conair.

The evidence shows that included within this literature is a sign which states:

> OPEN DOOR POLICY - Problems or grievances may be discussed with your supervisor without fear. Our Open Door Policy is a promise that we are alert and interested to our employees need. / 315/ /

Further, the Respondent distributed to all its employees 1 or 2 days before the election a document which states:

> Please read this before you vote. . . .They cannot represent you. Their grievance procedure is taking a step backward. Keep your present Open Door Policy to Conair Management. / 316/ /

It should also be noted that in the above mentioned document the Respondent further states:

> "Don't Be Fooled By The Union" . . . They make promises of job security; however they cannot guarantee you a job. Only Conair can secure your job. You have job security when you are working for a healthy, growing company with assurance of work. . . .

314/ See General Counsel's Exhibit 12(a)(1-12) and 12(1-11), and Respondent's Exhibit 6.

315/ See General Counsel's Exhibit 12-4, 12(a)-4. Noraima Mendez testified that she had seen such a sign, a large professionally printed sign, hanging in the plant stating "open door policy." Additionally General Counsel's Exhibit 74, which Mayorek testified was distributed to all the Respondent's employees either one or two days prior to the election stated:

> 'In May 1977, Mr. Arthur Marin was added to the Conair staff as Personnel Director to enhance the Open Door Policy.'

316/ See General Counsel's Exhibit 75(a) and (b). The Respondent's grievance procedure and open door policy are discussed in greater detail hereinafter.

Immediately following this statement is a graph which is entitled "Unemployment In New Jersey." This graph depicts rising unemployment in that state from 1973 to 1978 and is followed by the statement, "New Jersey has one of the highest rates of unemployment in the country. In the past several years unemployment has been steadily increasing." After this appears another graph which is captioned "Rise In Loss Of Union Jobs." This graph depicts a steady increase in the loss of union jobs from 1973 to 1978 with the comment below the graph, "In New Jersey union membership is on the decline. The unemployment has affected many union jobs."

The Respondent's Grievance Committee and Open Door Policy

Concerning the "grievance committee," Mayorek testified that sometime in 1975, the Respondent "set up grievance committees" with employee grievances being "handled in two forms, through a grievance committee, we held committee meetings on a monthly basis, and they were also handled through a suggestion box that we have around the facilities." According to Mayorek, initially members of the committee were informally chosen by their particular assembly line co-workers, but in 1976, committee representatives were elected, in some instances by written ballot. He added that as the amount of employees on each assembly line increased "two were chosen from a line . . . anywhere between seven and ten people at a meeting " which were held in the "lower conference room." Mayorek stated, "I met with them, Pat Tomaro, the vice president of engineering . . . Bob Gagas, the production manager, met in '76 with them," as well as Raab and Green. 317/ He related that notes were taken at each meeting and copies distributed to Rizzuto, Tomaro, himself and the employees who attended the meeting. 318/

Mayorek continued that as a result of the "grievance committee" meetings, the Respondent initiated various changes in terms and conditions of employment and plant improvements, i.e., a salary "grade system" based on the type of work performed, additional sick days and holidays with pay, improved health plan benefits, air conditioning in the production area, the hiring of a full-time nurse, additional microwave ovens and food vending machines in the cafeteria area, gloves for women assembly line employees, and rearrangement of working hours to benefit employees.

Mayorek testified that in addition to these committee meetings, the Respondent held general meetings with its employees, "three or four" in 1976 and 1977, in the cafeteria attended by various groups of employees, wherein both he and Rizzuto addressed the employees about the Respondent's various benefits such as the profit-sharing plan, the health and insurance plans, and the Respondent's

317/ Although both Raab and Green testified at the hearing they made no reference to the "grievance committee" and Gagas did not testify at all.

318/ While the Respondent was requested to produce these notes and Mayorek agreed to make them available, the Respondent never produced the notes at the hearing. Tomaro testified that as far as he knew, no formal minutes were taken of these meetings. Barsi testified that there were no typed minutes of those committee meetings ever given to her although she was a member of the committee in 1976 and 1977.

"open door policy." Mayorek continued that at the Respondent's annual Christmas party both he and Rizzuto outlined these benefits and reminded the employees that if they had any problems that they should see Mayorek or Rizzuto about them. He added that he in fact knew that employees had actually taken their personal problems to Rizzuto for resolution. He related that it was commonly known among the Respondent's employees that they could initially bring their complaints or grievances to their supervisors and if unsatisfied, then to Mayorek or Rizzuto.

Patrick Tomaro, Jr., the Respondent's vice president for engineering and research development, testified that because of problems arising between various of the Respondent's employees and a production manager in 1975, a committee was established 319/ with himself representing management and having one employee representative from each of the Respondent's then four assembly lines usually selected by the other employees on the particular lines. Tomaro stated that these employee representatives were not elected. He added that besides himself, the Respondent was sometimes also represented on the committee by the "director of manufacturing" and that meetings were held once every 2 weeks in his office. Tomaro related that as a result of complaints raised at these meetings by employee representatives the Respondent installed air conditioning, 320/ provided a microwave oven and sandwich and hot food vending machines in the plant cafeteria for employee use, instituted "labor grade system" of setting wage levels and added paid holidays and increased health benefits. Tomaro continued,

> . . . it got to a point where things became very minor like they wanted lockers . . . But they came up with little things that we did to make life more bearable in the plant.

Tomaro testified that he handled the committee meetings until October 1976.

Jerry Kampel testified at first that he did not know when the grievance committee started, but later in his testimony stated it commenced sometime in the middle of 1976. He admitted that he knew little about its operation, although he did know that grievances were aired at committee meetings. Kampel admitted attending only one grievance committee meeting in the conference room, but I am uncertain from his testimony as to whether Kampel has confused the "grievance committee" meeting with the executive conference meeting he attended with groups of employees during the afternoon of April 6, 1977. Kampel recalled that a few grievances were raised at the meeting, including "one grievance about gloves" to

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319/ Tomaro testified that this committee was not referred to as a "grievance committee," but "We just called it the committee."

320/ Tomaro admitted that the Respondent was itself also aware of the need for air conditioning in the summer and the failure of the plant's heating system in the winter because employees had been required to be sent home because of these problems. He also admitted that while the question of air conditioning had been raised at a committee meeting the heating problem in the plant in winter may not have been.

protect women employees' hands and another about the unfair discharge of an employee, as well as "some discussion about better wages." 321/

Lucille Barsi, another of the Respondent's witnesses, testified that she had been elected to the committee to represent the employees on her assembly line in late 1976 or early 1977, that meetings were held once a month in the conference room, 322/ and that the committee dealt "mostly with any problems on the line, if there was a problem, with any certain girl or anything with the work or someone would like to know about the raises or benefits . . . there was something about a cafeteria we were going to have." 323/ Barsi continued that it was her "job" as a committee member to tell her co-employees on her assembly line what management had to say at these meetings and that the committee's basic purpose was "if there was any grievances." She added that although she asked her co-workers on the line if they had "anything that they wanted to ask about" preparatory to attending the meeting, she never received a specific grievance to report about at the meeting nor did she ever present a grievance herself. Barsi added that, "Well I never actually heard grievances, except talking about the conditions of the company." Significantly, she also related that Arthur Marin dealt with the grievance committee at all of the meetings she attended, and that

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321/ I mus' admit that I found Kampel to be a less than satisfactory witness. His consistent inability to recall what was said by management representatives at the various meetings he attended (his attendance was noted by other witnesses) and indeed his inability to remember whether he attended some of these meetings, particularly in instances where his testimony could be damaging to the Respondent's case, is highly suspicious. Kampel is the Respondent's vice president for sales, seemingly articulate and bright, and he clearly remembered all instances of violence against employees and management personnel by strikers or union representatives as well as anything else which occurred which could be considered detrimental to the General Counsel's or the Union's cause. My doubts about Kampel's veracity are reinforced by his sometimes evasive and at other times incredible testimony; for instance, his account of the circumstances surrounding the taking of his affidavit by counsel for the General Counsel, Robert A. Wiesen, Esq., and his subsequent disavowal of statements in the affidavit which he swore to be truth. Kampel denied that Weisen had told him the purpose for taking the affidavit, but he could not recall exactly what Wiesen had said. It appeared that when faced with his sworn affidavit he attempted to negate any portions thereof which could adversely affect the Respondent's position on the issues herein.

322/ Barsi testified that before the commencement of the Union's organizational campaign these meetings were held in the cafeteria.

323/ This latter testimony was elicited by a leading question. It should be noted that Counsel for the Respondent used this tactic many times on direct examination of this witness, and other of the Respondent's witnesses, and even though I sustained the objections made thereto, it was obvious that the witness had been alerted as to the answer to be given. Also Barsi at times seemed to confuse the "grievance committee" meetings with the meetings held the week of April 4, 1977 and with "group leader" meetings.

Marin had told the committee members that if they had any problems on the assembly line to bring that up at the committee meetings. 324/ Barsi also testified that she believed that they discussed hot food or different kinds of food to be served in the cafeteria at these meetings.

Interestingly, Arthur Marin, the Respondent's personnel director, testified that during the period from June 1, 1977, the date of his hire, through December 1977, the Respondent instituted many changes in the terms and conditions of employment at its plant, including "a system by which if any group of employees has a question on any subject, to have an informational meeting with myself or Mr. Mayorek where they may ask questions about the possibility of layoffs or what we believe is going to happen for--in case we need more products, the overtime packers, this type of thing. . . . It's a more formalized version of what occurred before."

Additionally, Josephine Torres, Rita Saulino, Georgina Echevarria and Gustavo Rodriguez testified on behalf of the Respondent about the "grievance committee." Torres, who had attended three committee meetings as a replacement when her assembly line's committee representative had been absent, testified that the meetings are held once a month, that there is one representative chosen from each assembly line by that line's foreman, that the purpose of the committee is for the members to pass along to the rest of the employees on their particular lines information given to them by management. Saulino testified that she became a member of the committee sometime in 1977, that meetings were held once a month, that they discussed "air conditioning (when to turn it on) . . . parking . . . and the heat, things of that nature. . . . " She related that these meetings were concerned with the "plant in general" and not "any particular individual's problem." Saulino added that the commmittee was not considered a grievance committee but was a "representative committee." Echevarria recalled nothing about any grievance committee at the plant but did testify that there was "a committee inside the company . . . like a committee to represent all of us, all the workers," with a representative from each assembly line, but she never heard it referred to as a "grievance committee." She stated that she had been told about it by Rosa Cruz, her supervisor, and by the employee who represented her particular assembly line. Echevarria added that she had no dealings with the committee and that her line representative would report to the employees only when "there was something to be said." Rodriguez testified that his representative on the committee in April 1977 was his line supervisor Rosa Cruz.

324/ Marin was not hired until June 1, 1977. As noted hereinbefore, however, Barsi seemed to confuse and intermingle the various meetings which occurred and, as exhibited by many of the other witnesses for Respondent, her testimony reflected an inability to recall anything which could be deemed harmful to the Respondent's case. Moreover, Barsi displayed a disposition to cast in a "good light" those actions of the Respondent which she could remember.

Witnesses for the General Counsel Stephen Olah, Florence Jacko, Lucille Allen and Noraima Mendez, also gave testimony concerning the Respondent's "grievance committee." 325/ These witnesses all testified that they never nominated or voted for any representative to the committee; never submitted a grievance to the committee or knew of any employee who had submitted one; had never been informed by the Respondent that such a committee existed; did not even know who their committee representatives were except for Mendez, who stated that her representative was supervisor Rosa Cruz; and that no committee member had ever asked them if they had any grievances or voluntarily reported back to them what had transpired at the committee meetings. Olah, Jacko and Allen also testifed that they first found out about the "grievance committee" only after the strike started. 326/

With regard to the Respondent's "open door policy," Mayorek testified that there existed an "open door policy" at the Respondent's plant since it commenced operations in 1975. He stated that he personally spoke to each of fifty employees during that year telling them that management would look into their problems. He related that in 1976 both he and Rizzuto spoke to the then approximately 100 production and maintenance employees at three or four separate meetings during which they used the term "open door policy" when they encouraged employees to come to all levels of management with their problems and complaints. Mayorek continued that in 1976 many employees came to him and to Rizzuto with personal or work related problems and, as indicated hereinbefore, at the 1976 Christmas party Rizzuto told the employees that if they had any problems to come and see Mayorek or himself. Mayorek added that during the first 3 months of 1977, "There had to be hundreds" of employees who came to his office with complaints to be resolved. 327/

Mayorek admitted however that the Respondent's "open door policy" was not mentioned in the Respondent's personnel manual distributed to its employees

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325/ It should be noted that these witnesses, although alleged discriminatees and under the Board's policy at the time, were generally excluded from coverage under sequestration orders. However, except for when individual witnesses were called to testify, they voluntarily remained outside the hearing room during the General Counsel's rebuttal case.

326/ However Jacko also testified that the Respondent, prior to the Union's organizational drive at Conair, regularly held monthly meetings wherein, "a person or maybe two people from a line attended" with management representatives, ". . . and they were supposed to come back and tell the people on the line what was said so that we'd know what was going on." While Jacko stated that she had never attended one of these meetings, she believed that employees who did attend, "might explain their grievances or complaints or gripes." Mendez related that she heard about it in 1976, about six months after she commenced her employment with the Respondent. Carlos Cruz, another of the General Counsel's witnesses, testified that the Respondent "had meetings with employees" prior to the advent of the Union's campaign but that he also had never heard of a "grievance committee."

327/ However, when asked to name some of these employees, he mentioned Ann Gere, overall line supervisor, and Chance Nesbeth, a warehouse worker who "later on in the year" was promoted to supervisor.

upon hire nor in any other of its literature given to employees prior to the advent of the Union's organizational campaign. Interestingly, during Mayorek's testimony, he remarked that the meetings held during the week of April 4, 1977 were initiated by the Respondent primarily because management felt that there "was a communication problem" with its employees. Mayorek later added that this had occurred since the Respondent had many new employees who were unaware of the benefits Conair granted to its employees. 328/

Arthur Marin 329/ testified that one of the many changes implemented by the Respondent after his hire was, "we started a system of an open door where whenever an employee has difficulty . . . and if in my judgment his complaint is valid, I will talk to the supervisor and question and at my discretion I can override the supervisor if what I believe he or she has done is wrong."

Jerry Kampel also testified that employees brought their problems to him many times during the period he worked for the Respondent as a vice president and that he discussed such problems with the employees on an individual basis but wasn't sure as to how many times, whether it was 20, 25 or 50. His testimony concerning whom he spoke to, what was said, when the conversation took place, evidenced his customary lack of recall and seemed unclear and at times evasive. While Kampel could only remember the names of three employees whom he spoke to, "Guerney," "Leroy" and "Israel," none of these employees were called as witnesses or further identified.

In contrast to the above, Olah, Jacko, Mendez, Allen, Cruz and Palmer, witnesses for the General Counsel, all testified that they had never attended any meetings in 1976 when either Rizzuto, Mayorek or Kampel spoke to employees, nor did they hear about any such meetings; that prior to the week of April 4, 1977, not only had they never heard the phrase "open door policy" but that no one in

328/ Herbert Burstein, counsel for the Respondent, also referred to this in his speech to the employees in the plant cafeteria on October 26, 1977 when he stated:

> When a company grows at this rate, as this company has, there is always a failure of communications, people don't talk with each other and maybe the company has failed in that regard and I never excuse management. When you have a labor problem, it is a two way street. Somewhere management has failed and I don't hesitate to say it because my job is to speak the truth to my clients, and one of the things that its failed is a lack of communication and here again, we have a problem.

329/ Marin was present at the hearing during the testimony of various witnesses when Mayorek, the Respondent's chief representative, was absent therefrom; on some occasions both Marin and Mayorek were present. Considering the sequestration order and the parties' agreement to the parameters of his testimony which would not in effect violate the order, I therefore allowed Marin to testify herein. Marin testified that one of the reasons for his hire was to listen to employee complaints.

management including Rizzuto, Mayorek or Kampel had ever asked them about their problems or complaints. Some of these employees testified that they didn't even know who Rizzuto, Mayorek and Kampel were. 330/

Significantly employees Delfina Rodriguez, Georgina Echevarria and Matilda Morales, the Respondent's own witnesses, also testified similarly to the above. Rodriguez stated that prior to April 1977, neither Rizzuto nor Mayorek had ever told her to come to their office to see them if she had a problem and she would "never think of going" to their offices. Rodriguez added that she had never spoken to Rizzuto or Mayorek before the strike commenced on April 11, 1977 and did not know who Kampel is. Echevarria testified that neither Rizzuto, Mayorek or Kampel had ever spoken to her nor had they ever told her to come to see them to discuss her problems at any time before the meetings held during the week of April 4, 1977. Morales testified to not knowing who Rizzuto or Mayorek are except that she had heard that Rizzuto was "the president or owner or something."

The Meeting of October 26, 1977

It is undisputed that the Respondent held a mandatory meeting of its unit employees in the cafeteria on October 26, 1977, at which time the Respondent's president, "Lee" Rizzuto and its counsel, Herbert Burstein, Esq., addressed the employees. Arthur Marin, the Respondent's bilingual personnel director, translated Rizzuto's statements into Spanish for the employees and also addressed the employees himself. 331/

According to the tape recording of this meeting, Rizzuto told the gathered employees that Conair's product competes against major companies with vast resources and that the Company's success to date is based upon "giving the consumers a good product at a fair price." Rizzuto continued that "The unemployment rate in Jersey, particularly in this area, is as high, if not higher, than any other industrial area in the United States," and that Conair, in spite of "wide-spread talk about recession or depression" had been able to maintain production and sales. He asked for the cooperation and help of the employees in continuing this trend of increasing its employment and sales. Rizzuto stated that he had been advised that "because of the current situation," it would be unlawful for the Respondent to make any promises:

> . . . but most important for the Spanish, for the employees to consider is what occurred in past times. . . . The company has embarked on programs which are intended to improve working conditions, benefits in the wages and we intend to keep--continue on that path. . . . The company is engaging in /many/ programs to better the conditions of jobs, better the conditions of money, better the conditions of work here and outside of the factory.

330/ See the testimony of Lucille Allen and Florence Jacko.

331/ The Respondent introduced into evidence a tape recording of this meeting (Respondent's Exhibit 52). Richard Escala, one of the Respondent's assembly line supervisors, testified that "production was shut down" for the meeting. However, he could remember nothing that was said at the meeting by Rizzuto, Burstein or Marin.

Rizzuto next listed for the employees various employment benefits which had been granted or been increased over the years, such as improved health and welfare insurance benefits, increased sick leave, additional vacation days and holidays with pay, higher wage scales, the profit-sharing plan, etc.

Rizzuto told the employees:

> The company has embarked on programs which are intended to improve conditions, benefits and wages, and we intend to--intend to continue on this path, for the years to come.
>
> If I were to spell out for you our plans for the future, the union that has been trying to organize here would, of course, run down to the National Labor Relations Board and complain that we were interfering with them.
>
> Of course, the union is free to make all kinds of promises. Unions frequently promise huge wage increases, great fringe benefits, but rarely secure it.

Rizzuto continued, making reference to the loss of union membership in "the past few years" as reported by newspapers and magazines. He attributed declining union membership to many factors, including what he called unfulfilled union promises and the "needless number of strikes which occur." He referred to the Respondent's own past strike loss as "almost a million--almost a half a million dollars . . . and these are our benefits, yours as well as mine, and through all this here, you have to pay dues and this, again, is something the union wants." He repeated that the Union can make promises of increased wages and fringe benefits but rarely secures these.

Rizzuto stated further:

> ... Of course, the union has the power to call a strike. A union can engage in violence. An employe/ r/ cannot call a strike. He cannot back-out and he cannot encourage violence. . . . In the case of Conair, we lost more than half a million dollars for the benefits that you were going to receive for the conditions that we had in the loss of production and the other situations of strike. The strike is a situation that cost a lot of money for the employees and also for the company. We have seen abuse of the co-workers, sabotages, jamming of the Conair belts, destroying our property, fouling up our products and fires. This violence cannot be tolerated and it will not be by the company. . . . Unions have the right to organize, employees have the right either to join a union or to refuse to join a union.

Rizzuto reiterated the above concerning violence during the strike, then mentioned the requirement of dues payments to the union as a condition of working, the right of a union to call a strike and, "We have a right to say what is a fact, that is that any employee who has a grievance has always had an open door to management." He again spoke about the Union's right to organize employees and referred to the violence that occurred.

Rizzuto continued:

> Of course, we have made mistakes. Of course, there are things we could and should have done, but we didn't, but we learned from our mistakes and we correct our omissions. . . . What we say that is important that you have to consider, that it is your better benefit to be organized by a union that is violent or to have the facilities to obtain a resolution of your problems to speak /w/ith the bosses here directly. . . . What we desire here as bosses is to give you better employment jajor /sic/ establishment and better opportunities to advance. We don't think you need a union, but that is our opinion. The final decision must be made by you and when you make that decision, I am sure you will consider all the facts. . . .

Rizzuto advised the employees that they could not be forced to join a union if they did not desire to do so, then thanked the employees for their hard work, and referred to "meeting the competition of imports and et cetera that really keeps our position and your job and my job secure."

Herbert Burstein, the Respondent's labor lawyer, also spoke to the employees, repeating to some extent what Rizzuto had previously said; that Conair could "not discuss certain /employee/ grievances, not to make any promises." He continued:

> . . . some of you feel that promises were made in the past that have not been fulfilled and that's probably true. That's probably true, but starting as of April of this year, when the company had a series of programs scheduled together, I was obliged to tell them don't do anything because we will wind up with extraordinary delay, picket lines, disruption, interference with the company's workers and the jobs of the people.

Burstein mentioned that although Conair "has got to look into wage structure, labor grade classifications, methods of improving opportunities," it could not do so at this time unless it wished to court "endless lawsuits."

After referring to acts of sabotage and fires, court actions, etc., Burstein then mentioned management's failure of communications with its employees adding:

> I can't say what the company proposes to do because the moment we tell you that we'll wind up in a rankle in warfare in the courts and in the Board. Now, all I suggest to you is this, and I remind you, you have a right as an American citizen . . . you have a Constitutional right, a very important right to join a union or to refuse to join a union, but don't be misled by phoney promises. . . . when and if you get into a ballot box, a booth, and you pull a lever, you have got to say, is this in the best interest of myself in terms of job opportunities, job security, is it good for my family, is it good for my co-workers and if you decide that a union is best for you, that's your choice, but

don't make that choice unless you know the facts. Don't let them kid you. Now, don't believe that unions produce all these benefits.

The Appropriate Unit

The second amended complaint alleges that:

> All production and maintenance employees including shipping and receiving employees, warehouse employees, truck drivers and janitorial maintenance employees employed by Respondent at its Edison plant, but excluding all office clerical employees, plant clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The Respondent in its answer neither admitted nor denied this allegation but instead averred that "The determination of the appropriate unit must be the subject of a separate proceeding." 332/

However in the representation proceeding, Case No. 22-RC-7119 the Respondent executed a Stipulation for Certification Upon Consent Election wherein it agreed to the appropriateness of that very same unit of employees. It has long been the Board's uniform policy to refuse to redetermine unit issues in an unfair labor practice proceeding in the absence of changes of facts surrounding a prior unit determination, or the discovery of evidence unavailable to the Respondent in the representation proceeding. 333/ As the Board stated in The Baker and Taylor Co., 109 NLRB 245, 246 (1954):

> This principle is applicable equally to cases in which the necessary facts are determined by the Board upon the record of a hearing, and to cases in which the parties have consented to expedite resolution of a question of representation by agreeing to the determinative facts for purposes of conducting the election.

332/ The General Counsel asserts that the Respondent's failure to deny or admit the allegation in the second amended complaint regarding appropriateness of the unit, but merely averring that the determination thereof is properly the subject of a separate proceeding, should be deemed an admission by it of such unit's appropriateness citing Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, which states:

> . . . any allegation in the complaint not specifically denied or explained in an answer filed, unless the Respondent shall state in the answer that he is without knowledge shall be deemed to be admitted to be true, and may be so found by the Board, unless good cause to the contrary is shown.

I do not agree. The Respondent's contention that the appropriateness of the unit herein should be the subject of a separate proceeding carries with it the inference that it actually does not concur with the unit as set forth therein. However, be that as it may, for other reasons as set forth above, I find this unit to be appropriate for the purposes of collective bargaining under the Act.

333/ J. H. Filbert, Inc., 165 NLRB 648 (1967); Corral Sportswear Company, 156 NLRB 436 (1965); The Baker and Taylor Co., 109 NLRB 245 (1954).

Further, the burden of proof to establish that there have indeed been changes that would warrant altering the appropriate unit as determined in the context of a representation case is upon the party asserting such change. 334/ In this case the Respondent offered no evidence at all on the issue of unit appropriateness nor explained in any way why the above unit is not appropriate for the purposes of collective bargaining.

In view of the above I find and conclude that the unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of: All production and maintenance employees including shipping and receiving employees, warehouse employees, truck drivers and janitorial maintenance employees employeed by the Respondent at its Edison plant, but excluding all office clerical employees, plant clerical employees, professional employees, guards and supervisors as defined in the Act.

The Excelsior List 335/

The record discloses that the Excelsior list of employees includible in the appropriate unit and alleged to be eligible to vote in the election submitted by the Respondent to the Board in connection with the processing of the petition in the representation proceeding herein, Case No. 22-RC-7119, includes the following names: John Raab (vice president), William Reed (inventory manager), Nicholas Alfano (maintenance supervisor), Bob Gagas (plant manager), Ann Gere (chief assembly line supervisor), John Mysak (head of quality control), Joseph Marano (quality control supervisor), William Shaw (quality control supervisor), Louis Russo (warehouse manager), Peter Valentino (service manager), and Anthony Mastellone (receiving department head).

As noted above supervisors are excluded from the unit of employees found appropriate for the purposes of collective bargaining herein not only expressly by the Stipulation for Certification Upon Consent Election signed by the Respondent but also as would be true under long established Board precedent regarding like units of employees. Concerning these employees it should also be noted that the Respondent in its answer admitted the supervisory status of Ann Gere 336/ and Joseph Marano. 337/

John Raab, a vice president, testified that "everyone" at Conair was aware of his vice presidency at the time the Excelsior list was prepared and it

334/ Arizona Public Service Company, 188 NLRB 1 (1971).

335/ The Excelsior list contains the names of 322 of the Respondent's employees. See General Counsel's Exhibit 55.

336/ Gere testified that although she was a supervisor, she felt that she was entitled to vote in the election and in fact did so.

337/ Albeit this admission by the Respondent in its answer, and Mayorek's testimony that he assisted in the preparation of the Respondent's answer herein and was aware of the admission, Mayorek nevertheless denied at the hearing that Marano was a supervisor. The evidence clearly shows and as I found herein before, Marano is a supervisor within the meaning of the Act.

cannot be seriously argued that Raab is not a supervisor. I therefore find that he is a supervisor within the meaning of the Act. Raab also testified uncontradictedly that Nicholas Alfano has been employed as a maintenance supervisor throughout his tenure of employment. I also therefore find that Alfano is a supervisor within the meanng of the Act.

Stephen Olah testified that William Reed was his supervisor in the service department and Reed in his testimony did not deny this. It is uncontested that Reed is the inventory manager of the service department. Further the Respondent admitted Reed's supervisor status in its answer and as indicated previously I therefore found him to be a supervisor within the meaning of the Act. Additionally, the evidence herein clearly shows that Bob Gagas, the Respondent's plant manager, Louis Russo, its warehouse manager, and Anthony Mastellone, its receiving department head, all are supervisors within the meaning of the Act. The Respondent did not dispute this at the hearing.

Mayorek testified that Peter Valentino the service department manager had approximately 25 to 30 employees under his supervision. Annette Palmer related that Valentino had been the head of this department when she sought to return to her job after the strike ended. I therefore find that he is a supervisor within the meaning of the Act. Mayorek also testified that William Shaw is employed in the quality control area and that he reports to the head of the Quality Control department, John Mysak. He stated that Shaw gives orders to two or three employees in this department as to what is to be done, instructs them as to how to do their work and directs them in the performance of their jobs. In view of this I find and conclude that both William Shaw and John Mysak are supervisors within the meaning of the Act.

John Mayorek testified that when the Board requested the Excelsior list from the Respondent in April or May 1977, a Board agent had explained the purpose for the list and enumerated the "four or five particular groups of people . . . in the company" to be included therein. He stated that at that time he was unaware that supervisors were precluded from voting in the election in the representation case. 338/ Mayorek continued that the Excelsior list was prepared by "one of the girls in the personnel department" under his instructions

338/ In this respect and as a point of credibility it should be noted that Mayorek admitted that he discussed "the issues involved in the representation case" with the Respondent's labor attorney although he could not recall whether or not this included the topic of supervisors' voting status in the election. Significantly Mayorek also testified that he had excluded his own name from the Excelsior list because he was in the "Executive group" and this group was not one of those "particular groups" of employees who were eligible to vote in the election. Significantly, and as noted before, John Raab's name does appear on the Excelsior list, Raab being a vice president, and no explanation was given by Mayorek for this other than his denial that he checked the list before giving it to the Board implying that Raab's name was included inadvertently.

and was to contain the names of all eligible voters. He added that although he personally delivered the completed Excelsior list to the Board he did not check or review its contents at all. 339/

Moreover, Richard Escala testified as a witness for the Respondent that he is a supervisor of manufacturing exercising supervisory authority over 60 employees working on two assembly lines. He stated that he has two "group leaders" reporting to him in his capacity as line supervisor. 340/ Escala added that he holds the same position as that occupied by Rosa Cruz who was acknowledged to be a supervisor in the Respondent's answer to the second amended complaint. 341/ Significantly, Escala also testified that "everyone" in the plant knew that supervisors were not eligible to vote in the election and that his name was nevertheless included in the Excelsior list.

339/In this connection Mayorek testified as follows:

Q. Did you look at it after it was done?
A. No.
Q. You just gave it to him blindly?
A. Yes.
Q. As far as you knew these people weren't even employed at Conair then?
A. As far as I knew, yes.

340/ Escala testified that Maria Cabo and Cynthia Montemurno are the two group leaders reporting to him.

341/ Rosa Cruz' name was included in the Excelsior list as an eligible voter with Mayorek testifying by way of explanation that he was unsure as to whether Cruz was an assembly line supervisor at this time. General Counsel proffered into evidence a list prepared by John Mayorek which contains the names of employees occupying the position of assembly line supervisor or group leader as of April 9, 1977. Listed as supervisors therein are:; Ann Gere, Naomi Rodriguez, Nancy Rodriguez, Rosa Cruz, Cynthia Montemurno, Jim Pugh, Minnie Coppa and Richard Escala. See General Counsel's Exhibit 102. Additionally as noted before, Mayorek acknowledged having assisted Counsel in preparing the Respondent's answer to the second amended complaint wherein Cruz' supervisory status is admitted by the Respondent. All these employees' names were included in the Excelsior list. Further, with respect to Minnie Copa, listed as a supervisor in General Counsel's Exhibit 102, Mayorek testified that she was in charge of the hair roller production area and had four or five employees under her supervision. He stated that she directed them in the performance of their work. Nonetheless her name was also included in the Excelsior list.

Group Leaders as Supervisors 342/

Ann Gere testified that as chief assembly line supervisor she is responsible for the day to day coordination and management of the assembly lines and that the line supervisor and some of the group leaders report directly to her, although normally the group leaders report to their respective line supervisors. 343/ Gere added that there is one group leader assigned to an assembly line with 30-40 employees and two group leaders to larger lines of 90 employees. Both Gere and Richard Escala, a line supervisor, testified that the primary responsibility of group leaders is to insure that employees perform their duties correctly.

John Raab testified that the duties of a group leader were "to instruct and train personnel on the line and to feed them the parts or to make sure that whatever their job function is, they are supplied the goods." Raab denied that they make any recommendations concerning the discharge of employees but indicated that it was possible that they could make such recommendations to their respective line supervisors.

Rosa Cruz testified that she was promoted to group leader sometime in 1975 and then to assembly line supervisor during the beginning of 1976. Cruz related that at the time of her promotion to group leader, Bob Gagas, the plant manager, told her "I come to be a supervisor, come to be a group leader, be supervisor helping him. . . . He say in case supervisor be out, I have to run the line, help him with the jobs sometimes when he is busy, help him to take care of the people, give work on the line, what the people have to do, that's what." She added that she used her own judgment from time to time in the performance of her duties, as do all group leaders.

Lucille Barsi testified that her responsibilities as a group leader were "Just for running the line, make sure they do everything right and show the girls what to do." According to Barsi group leaders also train new employees, have no fixed position on the assembly line as other production workers do, but instead walk up and down the line inspecting the work to see that it is being properly done, maintain the work flow, and are a grade level 4 receiving $4.25 per hour while the highest grade production worker is grade level 3 which carries a lower hourly wage rate. 344/ Barsi added that she is in charge of the line when

342/ In the above-mentioned list of supervisors and group leaders as of April 9, 1977, Mayorek listed the following employees as group leaders: Jennie Olivo, Dan Rodriguez, Maria Cabo and Dennis Pryoles. The General Counsel alleges that group leaders are supervisors within the meaning of the Act. The Respondent denies this. All the above named group leaders were included in the Excelsior list.

343/ Gere testified that group leader Cynthia Montemurno was "in charge" of six employees on the packout line, "a small line" and that Montemurno takes "hourly counts" of work performed and reports directly to her. However Montemurno is listed as a supervisor as of April 9, 1977 in General Counsel's Exhibit 102.

344/ Barsi believed that the highest salary paid to group leaders was due to "more responsibility" which came with the job.

her assembly line supervisor Sam Consolle is not in the area at which time she handles any problems arising thereon.

Arthur Marin testified that when he became the Respondent's personnel director on June 1, 1977 he thereafter initiated supervisory training forums for supervisory personnel and group leaders were included therein. The evidence also shows that group leaders were included in "front office" meetings restricted to supervisory employees only and were regarded by their fellow employees as supervisors.

In view of the above I find and conclude that group leaders are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the unit found appropriate herein. 345/

The Election Held on December 7, 1977

Ann Gere related that on the day of the election from approximately 7:15 a.m. until 8 a.m. when the employees began to line up to vote, she was "all over the floor to make sure that everybody voted." Gere testified:

> I remember going up and down the lines after the election was over and I remember asking everybody did you vote, did you vote, did you go and vote, because my production manager at the time told me to do that, make sure there is somebody not sitting there and the poor thing afraid to get up to go and vote and she didn't vote. We made sure that everybody went and voted.

Gere added that beyond the above question asked by her concerning whether or not an employee voted in the election she said nothing else to the employees.

Arthur Marin testified that prior to the election he had given the Respondent's supervisors some background regarding the Act and had advised them that "no supervisor should ever dream of penalizing the employee because he was active in trying to form an organization.

An election by secret ballot was held on December 7, 1977, among all the Respondent's production and maintenance employees, including shipping and receiving employees, warehouse employees, truck drivers and janitorial maintenance employees, excluding all office clerical employees, plant clerical employees, professional employees, guards and supervisors as defined in the Act. As hereinbefore set forth Local 222 lost the election.

345/ See Columbia Typographical Union No. 101 (The Washington Post Co.), 220 NLRB 1173 (1975), (attends management meetings); Electrical Workers Local 901 (Breaux Electric Co.), 220 NLRB 1236 (1975), (receives higher wages); Gerbes Super Market, Inc., 213 NLRB 803 (1974), (regarded by fellow employees as supervisors). These are so-called "secondary" indicia or criteria the Board has used in determining supervisory status.

C. Acts of Interference, Restraint and Coercion

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

1. Solicitation and Satisfaction of Grievances

The second amended complaint herein alleges that the Respondent solicited grievances from its employees and indicated that such grievances would be adjusted in violation of Section 8(a)(1) of the Act. The Respondent denies these allegations.

Analysis and Conclusions

The Respondent admittedly became aware of Local 222's efforts to organize its employees sometime in late March or early April, 1977. Soon thereafter the Respondent held various meetings with all its unit employees 346/ both in mass and in smaller employee groups in its plant cafeteria, its production area and its executive conference room. These meetings were held during the week of April 4, 1977, during the course of the strike from April 11, 1977 through its conclusion on September 23, 1977, and during the period thereafter preceding the Board's representation election held on December 7, 1977. The evidence herein also shows that the Respondent solicited employee grievances at all these meetings through various of its representatives, advising the employees that they could bring their grievances and problems to the attention of management, mentioning by name vice presidents John Mayorek and Jerry Kampel, and even to the Respondent's president Lee Rizzuto himself, vis-a-vis, its "open door policy."

The General Counsel contends, in substance, that these meetings were unprecedented and a marked departure from the Respondent's past practices and therefore the solicitation of grievances from its employees at these meetings and the Respondent's express or implied indication therein that such grievances would be adjusted was violative of the Act. The Respondent, on the other hand, while admitting that grievances were solicited at these meetings asserts that this merely constituted a continuation of its previous policy and practice of soliciting grievances from employees, individually through its "open door policy," and collectively by means of its "grievance committee" both of which were in existence prior to the advent of the Union's organizational campaign. The Respondent contends further that since it did not accompany the solicitation of grievances with an express or implied promise of benefits to its employees to remedy these grievances specifically aimed at affecting employees in their organizational efforts, the Respondent's actions were not unlawful.

346/ As set forth hereinbefore these employees include all production and maintenance employees, shipping and receiving employees, warehouse employee, truck drivers and janitorial maintenance employees at the Edison plant excluding office clerical employees, plant clerical employees, professional employees, guards and supervisors as defined in the Act.

That these meetings were held by the Respondent not only in direct response to the Union's organizational campaign 347/ but also were unique in nature, unprecedented and a marked departure from the Respondent's past practices is patently clear from the record. The evidence herein shows that the Respondent's "open door policy" encouraging employees to bring their problems to management, if it existed at all prior to the Union's appearance on the scene, which I doubt, was in fact generally unknown to the employees, unpublicized and unencouraged as a policy procedure by the Respondent and rarely used on other than a most informal basis if then at all, by employees having problems pertaining to their work or private lives.

I am not unaware that John Mayorek, a vice president, testified that he personally told 50 employees in 1975 that management would look into their problems; that in 1976 both he and Rizzuto spoke to the Respondent's then approximately 100 production and maintenance employees three or four times about this and used the term "open door policy" in encouraging these employees to come to all levels of management with their problems and complaints; that also in 1976 many employees personally came to him and to Rizzuto with their problems both work related and personal; that at the Respondent's 1976 Christmas party Rizzuto told the employees that if they had any problems to come and see management; and that during the first 3 months of 1977, hundreds of employees came to his office with grievances they wanted adjusted, mentioning Ann Gere and Chance Nesbeth, both supervisory employees as having done so. I also note that Jerry Kampel, another vice president, testified that during his employment with the Respondent from 1970 until 1977, employees had discussed their problems with him anywhere from 20 to 50 times during this period although he was unable to recall the dates thereof or many of the conversational details and could only name three employees "Gurney," "Leroy" and "Israel" who had done so.

However the testimony of others of the Respondent's witnesses not only contradicts this, but strongly supports the conclusion that such a formal policy never existed. Arthur Marin, the Respondent's personnel director hired on June 1, 1977, testified that after his hire the Respondent "started a system of an open door" in which for the first time employees could go directly to a top level management representative, himself, with their complaints. Delafina Rodriguez, Georgina Echevarria and Matilda Morales, assembly line employees hired in April 1975, January 15, 1975 and March 5, 1976 respectively, testified in substance that they had never spoken to Mayorek, Rizzuto or Kampel nor had they ever been told by anyone that they could bring their problems to management. Rodriguez stated that before the strike started she would never think of going to Mayorek's or Rizzuto's office and no one ever told her she could do so. Rodriguez stated that she did not even know who Kampel was. Morales

347/ Jerry Kampel, one of the Respondent's vice presidents, admitted that these meetings were held because the Respondent had discovered that the Union had commenced organizing the employees at Conair and that there was "employee unrest." Kampel related that by "unrest" he meant that the employees had unresolved grievances and problems and that therefore Rizzuto, Mayorek and Kampel wanted to find out what these grievances and problems were.

and was only aware that Rizzuto was Conair's president or "owner or something" because she heard this around the plant.

Further, the General Counsel's witnesses, Olah, Jacko, Mendez, Allen, Cruz and Palmer all testified that before the meetings held by the Respondent during the week of April 4, 1977, they had never heard the phrase "open door policy," and that no one in management including Mayorek, Rizzuto or Kampel had ever asked them about their complaints or, in fact, spoken to them at all before these meetings. Jacko stated that she did not even know who Mayorek was, and this was also true of Allen who testified that before the union organizing started, she was unfamiliar with Mayorek, Rizzuto or Kampel and had no knowledge as to who they were.

Significantly as stated hereinbefore, Mayorek admitted that prior to the meetings held during the week of April 4, 1977 the Respondent realized that it had "a communication problem" with its employees. Kampel also acknowledged that this problem existed, although much to his own surprise. Additionally, Herbert Burstein, Counsel for the Respondent, during his speech to the employees on October 26, 1977 also referred to the Respondent's "failure of communications" with its employees. Further, it should be noted that Mayorek admitted that the Respondent's "open door policy" was not mentioned in any of its regularly revised personnel manuals distributed to all new employees containing, among other things, a description of the various benefits and programs which the employees enjoyed and other terms and conditions of employment at Conair, nor did it appear in any of the Respondent's literature distributed to its employees at a time prior to the Union's organizing campaign. 348/

With regard to the Respondent's alleged "grievance committee," while the credible evidence does show that the Respondent had in existence a "committee" comprised of representatives 349/ from its various assembly lines and other departments at Conair which met allegedly monthly, although it appears that it actually met less frequently, and which considered operational problems and coincidently their impact upon employee working conditions and needs, the "committee' meeting can in no way be construed to be similar in nature, extent and purpose to the type of meetings the Respondent held with its employees after the Union commenced its organizational campaign in March or early April 1977 through October 26, 1977, nor for that matter considered any continuation thereof. 350/

348/ It should be remembered that Mayorek testified that the Respondent's personnel manuals were considered important tools for management to communicate to employees what benefits they enjoyed in working for Conair. For that matter the existence of a "grievance committee," is also not mentioned therein.

349/ Both supervisory and non-supervisory employees served on the committee as representatives.

350/ John Mayorek, the Respondent's chief witness admitted that these meetings held by the Respondent subsequent to the start of the Union's campaign at Conair were conducted differently than were the "grievance committee" meetings held previous thereto..

It is again clear from the record that many of the Respondent's employees had no knowledge of the existence of this "committee" or that it functioned as a grievance committee at all, had little or no input into it and rarely received any output from the committee in the nature of reports back from their committee represenatives. Most significantly, it appears that from its inception, this "committee" was primarily used by the Respondent as a conduit to disseminate information from management to its employees through the members of the "committee" rather than as a "grievance committee" to solicit and air employee conmplaints.

While the Respondent maintains that this "committee" was a viable "grievance committee" whose purpose was to bring employee grievances to the attention of management, and as such was specifically known and referred to by the Respondent's employees as the "Grievance Committee," the evidence herein does not substantiate this contention. As previously set forth Mayorek testified that the "grievance committee" met approximately once a month, that he, another vice president Pat Tomaro, and Bob Gagas the Respondent's production manager, alternately functioned as the Respondent's representatives on the "committee" and that sometime in 1976, the assembly line employees started voting for their particular line representative to the "committee." He further testified that many changes in working conditions were made as a result of the "grievance committee" meetings such as a grade system of wages, installation of air conditioning in the production area, distribution of gloves to women production employees to protect their hands during work, the hiring of a full time nurse, the assignment of parking spaces by seniority, etc. However it should be noted that many of these changes were not instituted until after Marin became the personnel director on June 1, 1977 and according to Marin were initiated and instituted by himself.

Lucille Barsi, a witness for the respondent, testified that she was elected to the grievance committee as a result of a vote on her assembly line in or about the end of 1976 and remained a number thereof until 1978. She testified that the committee discussed "mostly problems on the line . . . raises or benefits, and this would be mostly general questions asked . . . and something about a cafeteria. . . ." Barsi also testified that management used the committee meetings to relate messages to the employees and that it was her job as a committee member to tell the other employees "what the company's message was. She admitted that "I never really heard grievances, except talking about the conditions of the company," and that she never received a grievance from any employee on the assembly line she represented, nor had she ever presented a grievance to the committee. Between the leading questions asked her by counsel for the Respondent on direct and the cleverly positioned and worded questions posed by counsel for the General Counsel on cross-examination, it is difficult to fathom time sequences from her testimony concerning her participation on the committee. As hereinbefore discussed Barsi's testimony is subject to suspicion anyway and it was clear that her time sequences concerning her committee membership were confused in her own mind.

However, Pat Tomaro testified that this "committee" was never called a grievance committee" and that while he was on the "committee" no election was

ever held to select representatives to it. Jerry Kampel, a vice president, testified that he first heard the "committee" referred to as a "grievance committee" a few days before the strike and further, did not know anyone who had ever been on the "committee." He also stated that he had no knowledge of anyone ever voting for or nominating anyone for the "committee."

Employees, Josephine Torres, Rita Saulino, Georgina Echevarria and Gustavo Rodriguez, called as the Respondent's witnesses testified as follows: Torres testified that she had attended three grievance committee meetings as a substitute and that the purpose of the committee was for members to pass on to the rest of the employees information given to them at the meetings by management; Saulino testified that while she is a member of the committee, Arthur Marin attended all the meetings she was at as the Respondent's management representative. She stated that questions from employees were discussed during the meetings applicable to general areas of company concern but not problems relating to particular employees, and that "we don't consider it a grievance committee . . . its a representative /committee/." Since Arthur Marin was hired as the Respondent's personnel director on June 1, 1977 it would strongly appear that Saulino was testifying about "grievance committee" meetings held after that date. Echevarria testified that she had never voted for anyone on the "grievance committee" nor ever heard it referred to as a"grievance committee." She also testified that she had no contact with nor any participation in the committee. Rodriguez testified that his representative on the committee in April 1977, was line supervisor Rosa Cruz.

The General Counsel's witnesses Olah, Jacko and Allen all testified that they first found out about the committee after the strike started on April 11, 1977. Mendez, another of the General Counsel's witnesses, stated that she first heard about it from other employees six months after she was hired sometime in 1976. They all related that they never nominated or voted for anyone, any committee member nor had any management representative ever mentioned anything to them about the committee. According to their testimony, they never submitted a grievance to this committee nor heard of one being submitted. Additionally, Olah, Jacko and Allen testified that prior to the strike, they were unaware of the identity of their committee representatives and Mendez stated that her representative was her line supervisor Rosa Cruz. They all added that they had never been asked by any committee member if they had a grievance to submit or voluntarily reported back to them what had transpired at a committee meeting. Further, as stated before, it should be noted that the Respondent's personnel manual makes no mention of a "grievance committee" and it was not mentioned in any of the Respondent's literature distributed to its employees prior to the electionon December 7, 1977..

However, Annette Palmer, another of the General Counsel's witnesses, testified that in February or March 1977, "right before all the trouble happened with the union," she attended a "grievance committee" meeting and that one person was elected from the service department in which she worked. She added that other representatives were chosen accordingly. The time sequence is very close here as to when the Unuion appeared on the scene and her participation on the

committee,and leaves a doubt in my mind in view of the other evidence herein as to the correctness of her dates.

Consider the contrast between these "committee" meetings and the manner in which the Respondent conducted the various meetings it held with its employees shortly after learning of the Union's organizing campaign.

As related by the General Counsel's witnesses, and in part corroborated by the testimony of several of the Respondent's own witnesses as set forth hereinbefore, on April 4, 1977, vice presidents Mayorek and Kampel at the mass meeting of employees in the plant cafeteria, stated that the Respondent has an open door policy which enables employees to discuss their problems or complaints with any of the Respondent's managerial or supervisory employees who would then try to resolve such problems and in response to various complaints raised at this meeting promised to remedy them. 351/

On April 5, 1977, four of the Respondent's warehouse employees were individually interviewed by Irving Green, the Respondent's director of materials, asked about their problems or grievances and told that Green's door was always open for discussion of their problems. Never had this happened to these employees before.

At a similar mass meeting of all the Respondent's employees on April 6, 1977 in the production area, the Respondent's president Rizzuto told the employees that he realized that the employees had problems and complaints, that management's doors were open so that employees could bring to the attention of the Respondent any of their problems or complaints. Rizzuto let it be known that help would be forthcoming and promised, in direct response to employee complaints raised at this meeting, that such complaints would be resolved. 352/ Also, Kampel, at this meeting, stated to the gathered employees that if their complaints or grievances could not be rectified by their immediate supervisors then they could see Rizzuto or other top level management representatives personally and present such complaints or grievances to them.

Following the second mass meeting with its employees and during the late afternoon of April 6, 1977, the Respondent conducted several consecutively held meetings with groups of its employees (approximately 12-15 employees each) in the executive conference room during which Rizzuto and Kampel reiterated that Rizzuto's door, as well as that of any of the other managerial employees, was

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351/ Mayorek and Kampel promised a wage and benefits package deal to be given to the employees at a future date, promised that an additional water fountain would be installed at the plant and promised to hire someone specifically to deal with employee problems, in answer to employee complaints thereabout.

352/ Rizzuto promised that the security guard's attitude towards employees would improve for the better, promised a wage package deal to be presented to employees in or around April 18, 1977, and promised to install a new water fountain in the plant.

open for employees to bring their problems to and again made promises to remedy grievances raised by employees at these meetings. 353/ Also on April 6, 1977, Mayorek presided over at least one, if not more, meetings in the plant cafeteria attended by, from 10 to 12 employees, during which he asked them about any dissatisfaction with working conditions and whether they had any grievances they wanted to air and promised to remedy such grievances. 354/

Further, during the pendency of the strike at a meeting with its employees held on or about April 15, 1977, the Respondent solicited employee grievances with Kampel advising them that they could continue to bring to management their problems and complaints. Kampel admitted that subsequent to April 11, 1977, he had told this very same thing to employees approximately 100 times. There is also evidence herein which indicates that both Mayorek and Kampel held meetings with groups of non-striking employees in the plant cafeteria during the course of the strike from April 11, 1977 to its end on September 23, 1977 during which they reiterated that management's doors were open and that the Respondent was sensitive to employee problems and complaints.

Again on October 26, 1977, the Respondent held a mass meeting of its unit employees in the plant cafeteria at which Rizzuto told the employees that "We have a right to say what is a fact, that is that any employee who has a grievance has always had an open door to management." Additionally, just prior to the elections and in posters put up around the plant area by the Respondent during the 2 or 3 months prior to the election on December 7, 1977, and in campaign literature it distributed to the employees during this period, the Respondent referred to its "open door policy" stating in one poster,

> OPEN DOOR POLICY - Problems or grievances may be discussed with your supervisor without fear. Our Open Door Policy is a promise that we are alert and interested in our employees' needs.

Significantly, never before had the Respondent's president, or its vice presidents conducted mass meetings on such a scale with its employees in its cafeteria or plant production area excepting perhaps on the occasion of the Christmas parties. Never before had meetings been called of this nature, having specifically as one of its objectives the solicitation of grievances. Never before had the executive conference room been used for the type of meetings

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353/ Rizzuto promised a package deal concerning wages to be presented to the employees on April 18, 1977. Kampel promised to resolve wage and job security complaints, promised to provide gloves for production line employees who had complained about injury to their hands during the performance of their work, promised a wage package deal on April 18, 1977 and promised that communication between employees and management regarding employee problems and complaints would be "opened up."

354/ Mayorek promised the employees at this meeting that the Respondent would give them a wage increase. Further during the week of April 4, 1977, Mayorek was seen patrolling the production area with an interpreter and with a pad and pencil talking to assembly line employees. In view of what was occurring at the time his actions strongly suggest that he was asking employees about their problems and soliciting their grievances.

conducted with its employees as occurred on April 6, 1977. Further Respondent had not sought to solicit employee complaints with such consistency and on such a large scale as evidenced herein prior to the advent of the Union's campaign. 355/

As stated before, the Respondent was aware that the Union was seeking to organize its employees and represent them for the purposes of collective bargaining at the time of the April 4 and 6, 1977 meetings and this is obvious from the record and admitted by the Respondent. In fact Mayorek also admitted that the meetings were held to find out about the employees' grievances which "were not answered." Further, and while he subsequently denied this in his testimony, Kampel, confirmed this in an affidavit given to the Board in which he stated that the executive conference room meetings on April 6, 1977 were held specifically for the purpose of finding out what the employees' grievances were because both he and Mayorek had been apprised that there was unrest among the employees. From all of the above I am inexorably led to the conclusion that first, these meetings were held in direct response to the Union's organizational campaign and designed with the purpose and goal in mind of thwarting, negating and counteracting any and all gains the Union had made in its efforts to organize and represent for purposes of collective bargaining the Respondent's employees and second, that the Respondent solicited its employees' grievances and complaints as an integral part of this plan in order to mollify the employees and remove the cause of their "unrest" additionally promising to remedy these grievances and complaints to suggest strongly to them that they did not need a union to help resolve their problems.

The Credibility Issue

With regard to the above and as to events discussed hereinafter, I tend to credit the account of what occurred as stated by the General Counsel's witnesses for the reason that their testimony was in large measure given in a forthright manner, was more detailed, generally unequiocal and clear, corroborative and consistent in nature with each other, and most importantly apparently consistent with the other evidence present in the record and therefore believable while the testimony of the principal witnesses for the Respondent was for the most part contradictory, evasive, guarded and quite defensive, at times unclear and equivocal, and in some instances of such an incredible nature as to be unworthy of belief. Significantly, at various times and concerning important issues involved herein, the Respondent's witnesses consistently contradicted not only their own testimony given both at the hearing and in affidavits previously acquired by the Board during the investigative stage of this proceeding, but also that of each other. 356/

355/ Mayorek admitted that the "several" meetings held in the conference room during the week of April 4, 1977, wherein Rizzuto addressed various groups of employees (approximately "fifteen") were not grievance committee meetings and were in fact "conducted differently."

356/ While this is clearly reflected in the testimony of John Mayorek, the Respondent's main witness, it is also true of the Respondent's other principal witnesses called in support of its contentions, Lee Rizzuto, Jerry Kampel, John Raab, Ann Gere, Rosa Cruz, Lucille Barsi and Josephine Torres. In the case of Mayorek, Kampel, Raab and Torres, the departure from (continued)

For example Mayorek testified that during the first mass meeting of employees held during the week of April 4, 1977, he spoke about the Respondent's grievance committee and assured the employees of their right to engage in union activities. On cross examination, after having been confronted with an investigatory affidavit which he gave to a Board agent approximately 1 month after this meeting occurred, his testimony raised substantial doubt as to whether he actually mentioned either of these topics at the meeting. Again, Mayorek testified that both he and Kampel spoke at the April 4, 1977 meeting and that Kampel reiterated what he had said although briefly. Kampel testified that he could not recall what he or Mayorek said at this meeting or whether he actually had addressed the employees at all. 357/

Mayorek testified with certainty that Rizzuto had never mentioned Hong Kong when he spoke to the employees at the second mass meeting of employees on April 6, 1977, yet Rizzuto, in his own testimony, admitted to so doing. Mayorek unequivocally denied that Kampel promised employees a wage package during the executive conference room meetings on April 6, 1977, yet Kampel testified that he did so. Mayorek at first testified that he had not referred to the returning striking employees as new or former employees on the morning of September 28, 1977 but later in his testimony he stated that he could not recall what references he had made to these employees that morning and that he might have called them former employees. 358/

356/ their affidavits was so substantial in part and their testimony varied so dramatically from the affidavit that it could not have been accidental. See Kern's Bakeries, Inc., 227 NLRB 1329 (1977).

357/ Kampel's testimony and the nature thereof was discussed hereinbefore in the evidence position of this decision.

358/ Particularly concerning Mayorek's testimony, the record is replete with myriad additional instances of contradictory statements, evasive answers and guarded testimony as given by him. In fact his testimony exhibited a highly suspicious pattern of being clear and direct when given in response to sometimes leading questions posed by the Respondent's counsel on direct examination while his recollection of these same events, as evidenced by his answers to questions posed by counsel for the General Counsel on cross-examination, became hazy, unclear, forgetful and equivocal. He could not remember details of incidents he was involved in or statements made by him or others of the Respondent's management employees to which he had previously clearly testified about on direct examination. Moreover Mayorek admitted to a disagreement between himself and the Respondent's president Rizzuto in and around the time of this hearing leading to his alleged near resignation and although he asserted that it was mainly due to a salary dispute, I got the distinct impression from nuances in his testimony that his very job as vice president with the Respondent depended upon his performance at the hearing and that Mayorek's problems with Rizzuto were solely due to Rizzuto's unhappiness with him, because of his "mishandling" of the "union problem" and the resulting unfair labor practice charges and subsequent litigation herein. I believe that Mayorek's testimony therefore was deliberately directed toward avoiding any intimation of illegal activity on the Respondent's part and also to place the Respondent's actions

(continued)

Further enforcing my determination to credit the testimony of the General Counsel's witnesses over that given by witnesses for the Respondent is the repeated failure of the Respondent, usually without explanation, to produce material witnesses and documents admittedly within its control. 359/ It is axiomatic that where relevant evidence is in the control of a party and the party fails to produce it without satisfactory explanation, the trier of the

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358/ in as lawful and favorable a light under the circumstances as possible without regard to what actually occurred, this being done in order to curry favor with Rizzuto and to retain his position with the Respondent. Although Mayorek denied this his denial did not ring true under the circumstances. Additionally, my decision not to credit his testimony in general remains unchanged by the Respondent's assertion that Mayorek was subjected to many days of both direct and cross examination during the hearing and being only human he was bound to become tired, nervous and apprehensive as a witness and forget aspects of his previously given testimony about the events which occurred. After considering this I find that it does not satisfactorily explain the obvious evasive and contradictory nature of his testimony and its less than believable tone. Further as indicated hereinbefore, many of the other witnesses who testified on behalf of the Respondent exhibited the same tendencies to be evasive, unclear, guarded, equivocal and forgetful as reflected in the evidence discussed hereinbefore in greater detail.

359/ The undisputed evidence herein shows that Rizzuto presided over a series of meetings in the executive conference room on April 6, 1977 and that John Raab, line supervisor Rosa Cruz and Bob Gagas the Respondent's production manager were also present. Gagas was not called as a witness at all and Raab and Cruz, although they testified herein, gave no testimony concerning these meetings.

Mayorek testified that notes were taken at the "grievance committee" meetings, typed and distributed to himself, Rizzuto and Tomaro. He also testified that the notes were available and would be produced at the hearing. These notes were never produced by the Respondent and no reason for their omission offered. Mayorek testified that Raab, Green and Gagas regularly represented the Respondent on the "grievance committee." Raab and Green were called as witnesses herein for the Respondent but did not testify about this. Mayorek testified that Raab was present during the first mass meeting with employees on April 4, 1977. Raab never testified concerning this meeting.

During and after some of the General Counsel's witnesses had testified the Respondent's counsel referred to tape recordings taken of the meetings held during the week of April 4, 1977 by the Respondent. Although the Respondent indicated that these tape recordings would be offered into evidence they were never produced at the hearing. Other such instances appear in the record as well. The General Counsel offered testimony concerning unlawful acts committed by Nancy Rodriguez after the Union's organizational campaign commenced. Rodriguez was not called as a witness herein.

facts may draw an inference that such evidence would be unfavorable to that party. 360/ Additionally many of the General Counsel's witnesses gave their testimony pursuant to subpoena and were still employees of the Respondent at the time they testified herein. As employees of the Respondent, their testimony was given at considerable risk of economic reprisal, including loss of employment or promotion, and it is not likely to be false. 361/

It should also be noted that the General Counsel voluntarily had its rebuttal witnesses Stephen Olah, Florence Jacko, Lucille Allen and Noraima Mendez, although alleged discriminatees, remain outside the hearing room during the General Counsel's rebuttal case as each of the others were testifying in order to enhance their credibility.

The solicitation of employee grievances during an organizational campaign accompanied by a promise, express or implied, that the grievances will be remedied is a violation of the Act. The essence of such a violation is not the solicitation of grievances itself; rather it is the promise to correct them, either express or inferred from the solicitation. 362/ Such conduct constitutes an unlawful restraint upon and interference with the employee's self-organizational rights guaranteed under the Act because implicit therein is the promise that benefits will be awarded to them by their employer so long as they are not represented by a labor organization and because it tends to frustrate the employee's organizational efforts by showing them that union representation is unnecessary. Thus when the Respondent herein, in response to the Union's organizational campaign, solicited grievances from its employees and then indicated that it would satisfy their demands, it violated Section 8(a)(1) of the Act and I so find. 363/

Even assuming arguendo that the Respondent had not expressly or impliedly promised its employees to adjust or correct their grievances after

360/ U.S. v. Denver & R.G.R.R. 191 U.S. 84,91-92 (1902) (failure to produce records); Publishers Printing Co., Inc., 233 NLRB 1070 (1977) (failure of employer to produce material witness); Penn Industries, Inc., 233 NLRB 928 (1977), (failure to produce time cards); Martin Luther King, Sr., Nursing Center, 231 NLRB 15 (1977) (failure of employer to produce material witness); Broadmoor Lumber Company, 227 NLRB 1123, 1130 (1977), (failure of employer to produce witness to corroborate denials).

361/ Shop-Rite Supermarket, Inc., 231 NLRB No. 72, 500 (1977); Georgia Rug Mill, 131 NLRB 1304, 1305 (1961). See the testimony of Rosaria Machin, Laura Martinez, Carmen Sagardia, Dorothy Lodato, etc.

362/ The Stride Rite Corporation, 228 NLRB 224 (1977). Campbell Soup Company, 225 NLRB 222 (1976); Uarco Incorporated, 216 NLRB 1 (1974).

363/ McMullen Corporation d/b/a Briarwood Hilton, 222 NLRB 986 (1976); Teledyne Dental Products Corp., 210 NLRB 435 (1974); House of Mosaics, Inc., Subsidiary of Thomas Industries, Inc., 215 NLRB 704 (1974); Tom Wood Pontiac, Inc., 447 F.2d 383, 384-385 (C.A. 7, 1971); International Harvester Company, 179 NLRB 753 (1969); Eagle-Picher Industries, Inc., Electronics Division, Precision Products Department, 171 NLRB 293 (1968). Also see Vaughan Printers, Inc., 196 NLRB 161 (1972).

soliciting the same, the unusuality of the manner in which these meetings were conducted by the Respondent's representatives and their actions therein, most assuredly would have constituted a violation of Section 8(a)(1). 364/

In The Stride Rite Corporation, the Board found that the Employer had violated Section 8(a)(1) of the Act when, after the Union commenced its organizing campaign, the Employer solicited grievances from its employees in a more elaborate and formal manner, constituting "changes in practice" than it had done so in the past having previously instituted only an informal, individualized grievance procedure.

Herein the various meetings held by the Respondent with its unit employees from April 4, 1977 through October 26, 1977 were the first grievance meetings of their kind and occurred only after the Union commenced its organizational efforts among the Respondent's employees giving rise to a compelling inference that the Union is unnecessary since the Respondent will remedy the employees' grievance without the need for union representation, a clear violation of Section 8(a)(1) of the Act. 365/ Additionally when the Respondent's management employees like Kampel and Mayorek personally told the employees that they could bring their problems, complaints and grievances to management on occasions other than at meetings mentioned above, the Respondent violated Section 8(a)(1) of the Act, since this constitutes unlawful solicitation of grievances. 366/

2. Threats and Warnings

The second amended complaint herein alleges that the Respondent, in violation of Section 8(a)(1) of the Act, threatened and warned its employees that its Edison plant would be closed and production facilities moved to Hong Kong, that employees would be discharged and benefits taken away, and that the Respondent would never bargain in good faith with any union if the employees became or remained members of the Union or gave any assistance or support to it. Respondent denies all these allegations.

364/ See York Division, Borg Warner Corporation, 229 NLRB 1149, 1152-1153 (1977); Herbert Kallen, d/b/a Smithtown Nursing Home, Smithtown Senior Home, and Smithtown Lodge, 228 NLRB 23, 26 (1977); Hadbar, Division of Pur O Sil, Inc., 211 NLRB 333 (1974); Teledyne Dental Products Corp., 210 NLRB 435 (1974); Associated Mills, Inc., 190 NLRB 113 (1971), enfd 82 LRRM 3035 (C.A. 7, 1973).

365/ The Stride Rite Corporation, 228 NLRB 224 (1977); Herbert Kallen, d/b/a Smithtown Nursing Home, Smithtown Senior Home & Smithtown Lodge, 228 NLRB 1977; Hadbar, Division of Pur O Sil, Inc., 211 NLRB 333 (1974); Teledyne Dental Products Corp., 210 NLRB NLRB 435 (1974); Associated Mills, Inc., 190 NLRB 113 (1971), enf. 82 LRRM 3035 (7th Cir. 1973).

366/ See Raley's Inc., 236 NLRB 971 (1978); York Division, Borg Warner Corporation, supra; Herbert Kallen, d/b/a/ Smithtown Nursing Home, Southtown Senior Home and Smithtown Lodge, supra. This is also true with regard to the Respondent's posters and literature in which it mentioned its "Open Door Policy."

Analysis and Conclusions

The evidence herein shows that at the April 4, 1977 meeting with the Respondent's unit employees, Mayorek stated that the profit sharing plan was available only for nonunion employees; that if a union got in the employees would be separated from management and lose their right to present grievances directly to management; and that with a union, the employees would have an inferior health insurance plan. There is credible evidence that Kampel reiterated what Mayorek said at this meeting.

On April 4, 1977, Rosa Cruz, an assembly line supervisor, told one of her line employees, Noraima Mendez, that the employees "better forget the union" because the Respondent's president, Lee Rizzuto, had a lot of money and did not need any headaches and that if the union came in Rizzuto would close the Edison plant and move his production facilities to Hong Kong. Additionally, on April 4 or 5, 1977 Cruz stated to approximately six employees near the ladies room, including Mendez, that Rizzuto had said he would not negotiate with any union and the employees had better forget about union representation. 367/

Ann Gere, the Respondent's head assembly line supervisor, on April 5, 1977 advised Carlos Cruz that "someone" had told her that he, Cruz, had signed an authorization card and that "he better watch out." Later that day Gere told Cruz that "all those people that signed cards are looking for is the plant to close down."

On April 6, 1977, the Respondent held another mass meeting with its unit employees during which the Respondent's president, Rizzuto, told the employees that the employees and management were "one big happy family" and with a union the employes would be separated from management; that the Respondent's profit sharing plan was only available for nonunion employees; that the Respondent has plant facilities in Hong Kong and Phoenix and if the Union came in the Respondent could not afford to pay its employees the increased wages the Union would demand and would probably go out of business; that there would be no more Christmas parties or gifts if the Union came in; and that if the employees were represented by a union it would take them a longer time to solve their problems because someone from the Union would have to represent them. 368/

367/ The Respondent's threat not to negotiate with any union is a violation of Section 8(a)(1) of the Act. See, Georgia, Florida, Alabama Transportation Company, 219 NLRB 894, 896-897 (1975), enf. 92 LRRM 2112 (C.A. 5, 1976).

368/ The General Counsel asserts that Rizzuto's additional statement to the employees at this meeting, that if the Respondent presented its wage package deal and the employees did not like it "the door would be open," is an implied threat of discharge. I do not agree. In reviewing this statement in the context of his entire speech, with its reference to the Respondent's "open door policy," it appears that what was meant and actually conveyed was the idea that if the employees were not happy with the proffered wage package they could complain to him about it and he would reconsider the offer, rather than as an implied threat that if they didn't like it they could leave the Respondent's employ or be fired.

During the afternoon of April 6, 1977, shortly following the above second mass meeting with its employees, the Respondent held several meetings with groups of 10-15 employees in its executive conference room. Rizzuto told these employees that their present health insurance plan was better than the one the Union would offer them; that the employees would lose their profit sharing plan with a union; that if the Union came in it would be cheaper for the Respondent to move to Hong Kong than to continue operation of its Edison plant; and that with a union there was no guarantee that the employees would continue to receive Christmas bonuses.

Additionally on April 6, 1977 William Reed, the Respondent's warehouse manager, told one of his department employees, Stephen Olah, that Olah had been seen talking to one of the union representatives. When Olah denied having signed an authorization card, Reed told Olah "just be careful."

On April 20, 1977, the Respondent sent mailgrams to each of its striking employees, stating as follows:

> We have called you repeatedly to return to your job, despite your promise to do so, you have failed to report for duty, there is no violence, employees freely enter the plant. Unless you report for work on Friday, April 22, 1977 at your regular starting time you will be deemed to have voluntarily quit your job.

The Respondent admitted that it deemed its striking employees to have quit their jobs when they did not report for work in response to this mailgram.

Further, the Respondent, in its June 9, 1977 letter sent to all the striking employees in both English and Spanish, rescinded the above mailgram and stated in the Spanish version that these employees were offered reinstatement to their former jobs, or substantially equivalent positions, "if" these employees unconditionally accepted the Respondent's offer to return to work then and there. 369/ The Respondent admitted again that it regarded the employees who did not return to work in response to the June 9, 1977 letter as having quit their employment, no longer employees of the Respondent, and not interested in their jobs.

Threats to discharge employees for engaging in statutorily protected strike action are violations of the Act constituting infringements upon the employees' right to engage in self-organizational activities. Therefore I find and conclude that the April 20, 1977 mailgrams and the June 9, 1977 letters sent to all the striking employees constitute an express and implied threat of discharge, respectively, and as such are violative of Section 8(a)(1) of the Act. 370/ The Respondent's rescision of the April 20, 1977 mailgrams was ineffective since the Respondent posed the same threat again in the later letter.

369/ The evidence establishes that between 75 and 80 percent of the Respondent's employees are Spanish speaking and that approximately 79 percent of the striking employees are Spanish surnamed.

370/ Matlock Truck Body & Trailer Corp., 217 NLRB 346 (1975); National Tape Corporation, 187 NLRB 321 (1970).

Additionally, the Respondent sent a letter to Adrian Pagan, a striking employee, sometime in July or August, 1977 advising him that it had notified the insurance companies involved in its employee "medical and life insurance policies" that Pagan was no longer working for Conair. This resulted in the termination of Pagan's coverage under the policy. 371/ Moreover, the notice from the insurance company subsequently terminating Pagan's medical and life insurance coverage lists as the reason for termination "left job."

When considered in the light of the Respondent's unlawful conduct herein, including numerous oral and written threats of discharge, (the April 20, 1977 mailgrams and the June 9, 1977 letters which I found previously to constitute expressed and implied threats of discharge, respectively), this notice constitutes an implied threat of discharge and is violative of Section 8(a)(1) of the Act. 372/ The statements made by the Respondent in this notice clearly tend to interfere with, restrain and coerce employees in the exercise of their Section 7 rights as they impart to the employee his loss of employment as a natural consequence for engaging in protected concerted activity; i.e., an unfair labor practice strike. 373/

On April 11 and 12, outside the Conair plant on an adjacent roadway, John Mayorek approached employees either arriving to work that morning or to join the strike then ensuing, and urged them to report for work. Noraima Mendez, an employee, testified that on April 12, 1977 Mayorek and Rosa Cruz met her and another employee on the roadway as they were arriving to join the picket line and after Mayorek told them it was safe to enter the plant because of the presence of

371/ The General Counsel, in its brief, notes that the letter to Pagan is in both English and Spanish, is in standardized form, bearing the saluation, "Dear Employee," and refers to "two prior requests" to return to work (which reasonably can only relate to the above April 20, 1977 mailgrams and June 9, 1977 letters admittedly sent to all striking employees). The General Counsel asserts that this establishes the inference that this letter was also actually sent to all strikers. While I am disturbed by the failure of other striking employees who were called as witnesses by the General Counsel to acknowledge receipt of this letter, I agree that from the evidence herein such an inference is reasonable. Additionally, as will be noted herein, despite the Respondent's explanation (which I have discounted) of the words "new hire ins." which were placed on the reinstated strikers' timecards, the words' presence would still indicate that, at least for the additional employees on whose timecards the words were added, the Respondent had ordered their insurance benefits cancelled and each such employee was notified of that cancellation.

372/ It is axiomatic that an employee cannot be threatened with discharge or be discharged for engaging in protected concerted activity. See, Matlock Truck, Body & Trailer Corp., supra; See also, The Terminal Taxi Co., d/b/a Yellow Cab Co., in connection with the impact of a statement within the context of the Respondent's other unfair labor practices.

373/ York Division, Borg Warner Corporation, supra.

the police, Cruz stated to them, ". . . the company . . . need you, otherwise you are going to lose your job." 374/

On October 19, 1977, Jerry Kampel, the Respondent's vice president for sales, while in the office of John Mysak, quality control manager, told employee Rosario Machin that he felt sorry for everybody because if an election were held and the Union won, Rizzuto was going to move the Company to Hong Kong. 375/

The evidence herein also shows that the Respondent posted three large signs outside its plant informing the public and its employees as well that Conair employees were not on strike. These signs remained posted during the course of the strike. The General Counsel contends that since the Respondent willfully posted these signs while admitting that it was aware at the time that its employees were on strike, the message contained therein impliedly threatened the employees with discharge and is violative of the Act. The Respondent disputes this.

These signs were posted outside the plant presumably to notify the public that the employees were not on strike. However, they were certainly within sight not only of the striking employees on the picket line but also in full view of the employees entering the plant to work each day. Considering the Respondent's numberous threats, expressed and implied, to close the Conair plant in Edison, New Jersey and move to Hong Kong if the Union came in, and the implied threats of discharge if the employees continued to support the Union found in the April 20 mailgram and the June 9 letter to the striking employees, what normally might be an uncoercive statement on a sign (albeit, knowingly false) becomes entirely different in nature and now carries within it an "intended implication," at least for the striking employees, that they were no longer considered employed by the Respondent. The signs also appear as a warning to nonstriking employees

374/ The solicitation of employees to abandon the unfair labor practice strike is violative of Section 8(a)(1) of the Act since this conduct constitutes unlawful interference by the Respondent in the rights of its employees to engage in protected concerted activity. See Irving Taitel, et al., 119 NLRB 910 (1957), enf. 43 LRRM 2025 (C.A. 7, 1958), cert. denied 359 U.S. 944, 43 LRRM 2741 (1959). Further, where an employer's solicitation is accompanied by other 8(a)(1) conduct, such as an unlawful threat of discharge, such solicitation constitutes unlawful interference and violates Section 8(a)(1) of the Act. See, Mosher Steel Company, 220 NLRB 336, 337 (1975); Webb Wheel Division, American Steel & Pump Corp., 121 NLRB 1410, 1411 (1958).

375/ During the course of his testimony in the instant proceeding, Kampel alluded to his friendship with Machin. However, the fact that an 8(a)(1) statement is uttered by a "friendly supervisor" does not lessen the severity of impact of such a statement. As the Board held in Caster Mold & Machine Company, Inc., 148 NLRB 1614, at 1621 (1964):

> warnings from a friendly supervisor, close to management, are no less a threat than warnings from a hostile supervisor. Indeed, warnings from such a friendly source may carry an even greater aura of reliability and truthfulness and may therefore, in a sense, be doubly effective.

that there is no valid strike and that they had better continue to report to work rather than support the strikers on penalty of losing their jobs. That the Respondent admits knowledge of the falsity of the statement on the signs when it put them up only reinforces this conclusion.

The Supreme Court stated in N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481, 2497 (1969), that in balancing the right of employer expression, as embodied in Section 8(c) of the Act, with the Section 7 rights of employees to associate freely, as protected by Section 8(a)(1) of the Act, such right of the employer cannot outweigh the rights guaranteed to employees, since in balancing such rights one must take into account:

> The economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. (Emphasis added).

By any objective measure, this statement in these signs, especially when viewed in the context of the totality of Respondent's conduct herein (including the aforementioned threats and implied threats of discharge), reasonably tends to interfere with, restrain and coerce Respondent's employees in the exercise of their Section 7 rights, constitutes an implied threat of discharge, and violates Section 8(a)(1) of the Act. See, York Division, Borg Warner Corporation, supra.

Moreover, during the weeks just prior to the Board's election on December 7, 1977, supervisory employees Naomi Rodriguez, Les Price, Ann Gere and Rosa Cruz all made numerous statements to employees asserting that if the Union won the election the Respondent would move its production facilities to Hong Kong. 376/ This is also true of the Respondent's quality control supervisor, Joseph Marano and one of its inspectors, George Zadroga, whom I found herein to be an agent of the Respondent under the Act. While the Respondent proffered evidence to show that its supervisors were instructed not to make statements in violation of Section 8(a)(1) of the Act, this does not constitute a defense. The Board has repeatedly rejected this contention as a valid defense since the only question is whether the statements were in fact made. See, Vegas Village Shopping Corp., 229 NLRB 279, 283-284 (1971).

Additionally, during the 2-week period prior to the election printed "raffle tickets" were circulated among the Respondent's employees which stated that:

376/ Naomi Rodriguez did not testify at the hearing and Les Price, although he did, failed to deny making such a statement in his testimony. Concerning Rodriguez, when relevant evidence is not produced, though under the control of one of the parties and no satisfactory explanation is given, an inference may be drawn that such evidence would have been unfavorable to said party. See, Martin Luther King, Sr., Nursing Center, 231 NLRB 15 (1977); Publishers Printing Co., Inc., 233 NLRB 1070 (1977).

Win An Exciting All Expense Paid Trip To
Conair's New Facilities in Beautiful Hong
Kong. Donation: One Union Vote

The General Counsel contends that the evidence herein warrants the finding that the Respondent was responsible for and caused the "raffle tickets" to be circulated. The Respondent vehemently denies having any connection with the preparation or distribution of this "pernicious" document.

In this connection, the evidence establishes that these "raffle tickets" were to be found all over the Respondent's plant, in the cafeteria, on the assembly line, and on chief assembly line supervisor Ann Gere's desk. The Respondent was admittedly aware of this. Witnesses proffered by the General Counsel also testified that they saw George Zadroga and Ann Gere distribute "raffle tickets" to employees. 377/ In view of the Respondent's characterization of this document as "pernicious," and unless the Respondent wished to have its employees in some way influenced by the message it purported to convey, the Respondent had a duty to specifically and unequivocally disavow any responsibility for the production or dissemination of the "raffle ticket" to its employees. It failed to do so even though it had ample time. Even assuming arguendo, that the Respondent could not be found to have initiated, promoted, aided, or participated in the preparation of the "raffle tickets," nevertheless under the circumstances herein, the Respondent's awareness of the "raffles" and that they were distributed to employees all over the plant, and the Respondent's failure to communicate to its employees that Conair was not planning to close its Edison plant and move to Hong Kong if the Union won the election was in effect an acquiescence and ratification of what the "raffle" stated.

In view of the above, I find and conclude that the "raffle tickets" clearly constituted threats of plant closure in violation of Section 8(a)(1) of the Act. 378/

Further, the evidence herein shows that during the same approximate 2-week period prior to the election, handwritten signs appeared near the men's and ladies' rooms at the plant and on the bulletin board at the cafeteria entranceway, stating: "Vote No or Move to Hong Kong;" "Vote for the Union and Move to Hong Kong and Make $5.00 a Week;" and "One Vote For the Union, One Step to Hong Kong." For the same reasons as set forth above regarding the "raffle

377/ Employee Dorothy Lodato testified that Gere was laughing at the time she distributed the "raffle tickets" to employees. Employee Florence Kurtanick additionally inferred that Zadroga in some respects considered the "raffle tickets" in a light hearted vein. This does not lessen the impact thereof as constituting a threat of plant closure in violation of Section 8(a)(1) of the Act since it is well settled that "the coercive and unlawful effect of a statement is not blunted merely because . . . /they/ are accompanied by laughter or made in an off hand humorous way." Ethyl Corporation, 231 NLRB 431 (1977).

378/ See, Viele & Sons, 227 NLRB 1940 (1977); Han-Dee Pak, Inc., 232 NLRB 454 (1977); Richland Textile, Inc., 220 NLRB 615, 617-619 (1975).

tickets" and although there is no evidence in the record that the Respondent distributed or posted these signs, the Respondent had a duty to effectively repudiate the signs which constituted a threat of plant closure if the employees voted for the Union in the upcoming election. 379/

The record evidence also shows that approximately 2 or 3 days prior to the election, assembly line supervisor Rosa Cruz told employee Florence Jacko, in substance, that she hoped the employees would not lose their Christmas bonuses if the Union got into the plant. According to the credited testimony herein, Cruz had also previously told employee Laura Martinez approximately 1 or 2 weeks prior to the election, that if the Union won the election the employees would lose their Christmas bonus. Additionally, in this regard there is evidence that a professionally printed large size poster was posted in the plant approximately 2 weeks prior to the election which stated that union members would not be entitled to Christmas bonuses. The Respondent did not deny having anything to do with this sign. In view of the above, I find that this constitutes a threat to take away the Christmas bonus, an existing benefit that the Respondent conferred on its employees, and is violative of Section 8(a)(1) of the Act. 380/

The evidence herein also shows that between November 15, 1977 and December 4, 1977, the Respondent stamped upon the "Statements of Account" which it distributed to its unit employees enrolled in its profit sharing plan the phrase "For Non-Union Employees Only." Additionally, the handwritten words "union members are not entitled to profit sharing plan" also appeared on some of these statements. Since John Mayorek admitted that the Respondent must have purchased the stamp used above and had seen it although he did not know where it came from, there is a strong inference created that the Respondent was responsible for the above. This clearly constituted a threat that the employees would lose their right to participate in the profit sharing plan if the union came in and constitutes a per se violation of Section 8(a)(1) of the Act. As the Board stated in Western Foundries, Inc., 233 NLRB 1033 (1977):

> . . . it is settled that employee benefit plans which on their face are restricted to participation or enjoyment by employees who are not members of a union . . . are inherently restrictive of employee rights guaranteed by Section 7 of the Act, and without further evidence of interference, restraint or coercion are per se violations of Section 8(a)(1) of the Act.

379/ Viele & Sons, supra; Han-Dee Pak, Inc., supra. Richland Textile, Inc., supra.

380/ See, Fuqua Homes Missouri, Inc., 201 NLRB 130, 133-134 (1973); Western Foundries, Inc., 233 NLRB 1033 (1977). Also see, on the issue of adverse inferences, Allis Chalmers Corporation, 234 NLRB 350 (1978); Muncy Corporation, 211 NLRB 263 (1974). There is also evidence in the record that employees were threatened with the loss of the annual Christmas party and the turkeys usually distributed by the Respondent therein if the Union came in, a clear violation under the circumstances present in this case of Section 8(a)(1) of the Act.

Further, the Respondent's use of campaign literature referring to the Respondent's profit sharing plan being only for nonunion employees would also be violative of Section 8(a)(1) of the Act. 381/

Approximately 1 or 2 weeks prior to the election, the Respondent's assembly line supervisor, Rosa Cruz, told employee Norris Garcia that there was not going to be an election at the Respondent's plant, that the employees had been lied to and that she could not understand why the employees believed that an election would be held. Approximately 2 weeks prior to the election Cruz had told employee Noraima Mendez that there would be no election because Rizzuto did not want either the election to be held or the Union to represent the Respondent's employees. When considered in the light of the numerous unfair labor practices committed by the Respondent in the instant matter, including countless direct threats of plant closure, these statements by Cruz were clearly calculated to impart to the Respondent's employees the total control that the Respondent maintained over their terms and conditions of employment.

The right to a free, untrammeled choice in an election conducted pursuant to federal law is fundamental to the Act. The Respondent, through Cruz, communicated to its employees, in essence, that not even federal law can protect them or assist them in deciding whether they desire union representation. The Respondent thus communicated to its employees that it has the power to decide whether or not there will be an election and that it had decided that there would be none. The Respondent, by threatening to prevent the holding of an election, imparted to its employees the total futility of proceeding any further in the exercise of their Section 7 rights and reaffirmed that it would determine the scope, if any, of such rights. By any objective measure, the statements made by Cruz in this connection "reasonably tend to interfere with, restrain and coerce" the Respondent's employees in the exercise of their Section 7 rights and are violative of Section 8(a)(1) of the Act. 382/

Finally, at a mass meeting of its unit employees on October 26, 1977, Rizzuto told the employees that the security not only of the company but of the employees would be affected if they did not "work as a team." Rizzuto then referred to the high rate of unemployment in New Jersey and the corresponding loss of union membership over the years throughout the country. He stated that no company can possibly give what the Union promises and "still stay in this competitive business . . . ." Rizzuto advised that unions make many promises but "rarely" secure benefits for the employees.

In reviewing what was said at this meeting by Rizzuto, Marin, and Burstein, I am inexorably led to the conclusion that the purpose of their remarks was to impart to the employees that if they supported the Union in any way and the Union were to win the election, the Respondent would go out of business, resulting in the loss of their joos and that therefore their job security was inextricably tied to the employees' rejection of the Union. As such these

381/ See, Western Foundries, Inc., supra; Jenkins Manufacturing Company, 204 NLRB 335 (1977).

382/ See, York Division, Borg Warner Corporation, 229 NLRB 1149, 1155 (1977).

statements amount to implied threats of plant closure in violation of Section 8(a)(1) of the Act. 383/

The Respondent in its defense asserts in its brief that what was said by its representatives and agents at the various meetings with employees, or on an individual basis with its employees, or in its campaign literature, signs, whatever, was free speech within the protection of Section 8(c) of the Act. I do not agree.

The case law under Section 8(c) of the Act allows an employer to express his opinions about the reasonbaly probable effects of unionization so long as threats of reprisal or promises of benefits are avoided. 384/

As the United States Supreme Court said in N.L.R.B. v. Gissel Packing Co.,Inc., 395 U.S. 575, 618 (1969):

> . . . an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain"a threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . See Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 274 n. 20. /Emphasis added./

383/ See, Terminal Taxi Co., d/b/a Yellow Cab Co., 229 NLRB 643 (1977); N.L.R.B. v. Gissel Packing Co. Inc., 395 U.S. 575 (1969). Additionally in a campaign leaflet, prepared in both English and Spanish, and distributed by the Respondent to its employees a few days prior to the election, the Respondent set forth similar information concerning unemployment in New Jersey, union loss of membership and jobs etc. The similarity between what Rizzuto said at the October 26, 1977 employee mass meeting and what is related in the leaflet makes it obvious that the Respondent impliedly threatened its employees with plant closure therein as well for the same reasons as enunciated above. The Board has held that the standard to be applied in determining whether a statement violates Section 8(a)(1) of the Act is whether its impact is such so as to reasonably tend to interfere with, restrain or coerce the employees. By any objective measure, especially when considered within the totality of the Respondent's conduct herein (including countless threats of plant closure), the Respondent's statement in this campaign leaflet violates Section 8(a)(1) of the Act, as it constitutes an implied threat of plant closure. See, York Division, Borg Warner Corporation, 229 NLRB 1149 (1977); Terminal Taxi Co., d/b/a Yellow Cab Co., supra.

384/ N.L.R.B. v. Gissel Packing Co.,Inc., 395 U.S. 575, 618 (1969).

The Court continued, saying:

> As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisals to be taken solely on his own volition." NLRB v. River Togs, Inc., 382 F.2d 198, 202 (C.A. 2, 1967).

The Respondent's expressions, made verbally or in writing in various ways and means, when considered in the context of all the statements made, can in no way be construed as closely akin to permissible predictions of possible adverse consequences of unionization which are specifically protected by Section 8(c) of the Act and unlawful predictions of events beyond the Respondent's control.

Significantly the Respondent was aware of the rumors running rampant throughout the plant that Conair would close down and move to Hong Kong if the Union came in. It had ample opportunity to advise its employees that this rumor was not true. The October 26, 1977 mass meeting with its employees would have been a fine opportunity to do so. The inference created is that the rumor served the purpose of dampening enthusiasm for the Union and that is what the Respondent wanted.

The Supreme Court in the Gissel case further states:

> Any assessment of the precise scope of employer expression, or course, must be made in the context of its labor relations setting. Thus an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in Section 7 and protected by Section 8(a)(1) and the proviso to Section 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear . . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment . . . .

Considering the Respondent's statements as a whole, its other unlawful action herein and in view of the above, it is inescapable that these were not communications of general opinion about union representation but in some instances outright "threats of reprisal or force or promise of benefit . . . threat of retaliation based on misrepresentation and coercion, and as such wihout the protection of the First Amendment." 385/ Additionally and analagous to the Gissel case the Respondent herein had no actual support for its assumption that the Union would demand unaffordable wage rates and benefits.

385/ N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

The Respondent in its brief further states that Section 8(c) accords an employer the freedom to tell his employees that:

> (1) if the employees joined the union, it might divert certain operations with a possible elimination of jobs; (2) the company's concern for the employees in the past had led to greater benefits than were being promised by union organizers; (3) strikes could result from union demands; (4) an employees' 'advancement opportunities' would be hampered by unionization and from the 'strife and tension' occasioned by the union. /386/

While this may be true, the Respondent, in its statements, cannot add that its plant will be closed if the union comes in, nor threaten to take away benefits nor promise additional or improved terms and conditions of employment unless or if the employees renounce the Union.

The threat of withdrawal of privileges and benefits of employment, emoluments of value to the employees, has consistently been held to be violative of the Act. In view of the above, I am inexorably led to the conclusion that the Respondent's statements, whether orally made by its representatives or agents, or writing in signs, letters, mailgrams, whatever, containing threats of plant closure, threats of discharge, threats to take away benefits, and threats not to bargain in good faith with any union, communicated unequivocally to the Respondent's employees that the Respondent would take retaliatory action against them because of their organizational efforts. "/The/established rule /is/ that an employer cannot engage in conduct calculated to erode employee support for the union." 387/

Therefore I find that the Respondent, when it made any and all of the above threats to its employees violated Section 8(a)(1) of the Act. 388/

386/ Citing: Southern Frozen Foods, Inc. and Laborers' District Council of Georgia and South Carolina, affiliated with Laborers' International Union of North America, AFL-CIO, 202 NLRB No. 92 (1973); Orchard Corporation of America and St. Louis Printing Pressmen and Assistants Union of North America, AFL-CIO, 170 NLRB 1297 (1968); Coronet-Western, a division of Coronet Industries, Inc. and Van Storage Drivers, Packers, Warehousemen & Helpers Local 389, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 203 NLRB 970 (1973); United Aircraft Corporation, Hamilton Standard Division (Boron Filament Plant) and Lodge 743, International Association of Machinists and Aerospace Workers, AFL-CIO, 199 NLRB No. 658 (1972), enf'd in part 490 F.2d 1105 (C.A. 2, 1973).

387/ N.L.R.B. v. Deutsch Company, Metal Components Division, 445 F. 2d 902 (C.A. 9, 1971), cert. denied 405 U.S. 988.

388/ Western Foundries, Inc., 233 NLRB 1033 (1977), Motor Wheel Corporation, 180 NLRB 354, 355 (1969) and Jenkins Manufacturing Company, 204 NLRB 335, 342 (1973) threat that the profit sharing plan was available only for nonunion employees); Auto-Truck Federal Credit Union, 232 NLRB 1024 (1977) (1977) and Vegas Village Shopping Corporation, 229 NLRB 279, 284-285 (1977) (continued)

Further the Board has long held that threats by an employer to close a business and discharge or lay off employees because of union activity are the most egregious form of interference with the free exercise of employee rights. 389/

3. Promises and Grants of Benefits

The second amended complaint alleges that the Respondent promised and then granted to employees benefits or improvements in their terms and conditions of employment in order to induce them to refrain from becoming or remaining members of the Union or giving any assistance or support to it. The Respondent denies this.

Analysis and Conclusions

The evidence herein shows that at the meeting held on April 4, 1977 with all the Respondent's unit employees, the Respondent's vice presidents John Mayorek and Jerry Kampel promised that the plant cafeteria would be enlarged to provide hot and cold meals; that an increased wage and benefits package would be presented and granted to the employees sometime in the future; that the Respondent would hire a bilingual personnel-oriented employee to listen to and resolve employee grievances and complaints; that a new water fountain would be installed in the production area; and that generally the Respondent would do its best, without a union, to make it better for the employees.

388/ (Threat that the union would separate the employees from management and cause the employees to lose their right to present grievances directly to management). Also see Section 9(c) of the Act; Vegas Village Shopping Corporation, supra, at 284-285 (1977) and Armitage Sand and Gravel, Inc., 203 NLRB 162, 166 (1973), enf. denied in part on other grounds, 495 F.2d 759 (C.A. 6, 1974) (Threat that the employees would have an inferior health insurance plan with a union); NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), Bruce Duncan Co., Inc., 233 NLRB 1243 (1977), Han-Dee Pak, Inc., 232 NLRB 454 (1977), The Terminal Taxi Co., d/b/a Yellow Cab Co., 229 NLRB 643, 646-647 (1977), Viele & Sons, Inc., 227 NLRB 1940, 1942 (1977) and General Stencils, Inc., 195 NLRB 1109 (1972), enf. denied 472 F.2d 170 (C.A. 2, 1972) (Threat that if a union came in the Respondent would close its Edison plant and move to Hong Kong because it could not afford the increased wages and benefits the union would demand); Fuqua Homes Missouri, Inc., 201 NLRB 130, 133-134 (1973) (Threat that with a union there would be no more Christmas parties or turkeys given out); The Buncher Company, 229 NLRB 217, 226 (1977) and Fuqua Homes Missouri, Inc., 201 NLRB 130, 133-134 (1973) (Threat that with a union the employees might lose their Christmas bonuses); Ace Beverage Co., 233 NLRB 1269 (1977) and Mosher Steel Company, 220 NLRB 336, 337 (1975) (Threat that if strikers do not abandon strike they will be discharged).

389/ General Stencils, Inc., 195 NLRB 1109, 1110 (1972), enf. den. 472 F.2d 170 (C.A. 2, 1972).

On April 6, 1977, the Respondent's president "Lee" Rizzuto addressed all the Respondent's unit employees at a meeting held in the plant's production area during which he promised that the plant security guard's negative attitude towards the employees would change for the better in response to complaints about this from the employees; that the cafeteria would be enlarged and hot food would be served therein; that a new water fountain would be installed so that women employees would not have to walk so far, again in response to employee complaints; that the Respondent would hire a Spanish speaking person to solve the employees' problems; and that a wage package deal would be presented to the employees on April 18, 1977.

At subsequent meetings with smaller groups of employees held by the Respondent during the afternoon of April 6, 1977 right after the second mass meeting had concluded, Rizzuto promised the employees that provision would be made for hot food in the plant cafeteria; that a Spanish speaking person would be hired to solve employee problems; and that the employees would be presented with a package deal on April 18, 1977 including better wages and benefits. At these meetings Kampel promised the employees, in response to employee complaints about wages and job security, to resolve their problems at a later date; to investigate and remedy an employee complaint about the unfair discharge of a fellow employee; that gloves would be provided in response to employee complaints about hand injuries occurring on the assembly lines; and that communication between employees and management regarding employee problems and complaints would be opened up and that a wage package deal would be presented to the employees on April 18, 1977.

On April 6 or 7, after a meeting of management and supervisors in the "front office conference room," Rosa Cruz, a supervisor, told the employees on her assembly line that the Respondent was going to offer the employees a wage package deal in about 2 weeks and shortly thereafter, on the same day, fixed the exact date as April 18, 1977.

Additionally, after the commencement of the strike on April 11, 1977, the Respondent through Jerry Kampel told the Respondent's employees that the Respondent could not offer the previously promised wage package or "anything else" until the labor problems were resolved. Kampel also told the employees that while the Respondent could do nothing about the promised wage increase and other benefits at that time it would rectify this after the labor troubles were over. Kampel stated that he told this to approximately 150 of the non-striking employees over "a hundred times."

Again, on October 26, 1977, the Respondent held a mass meeting of all its unit employees during which Rizzuto told the employees,

> The company has embarked on programs which are intended to improve conditions, benefits and wages, and we intend to . . . continue on this path, for the years to come.
>
> If I were to spell out for you our plans for the future, the union that has been trying to organize here would, of course, run down to the

> National Labor Relations Board and complain that we were interfering with them. . . .

Rizzuto continued,

> Of course, there are things that we could and should have done, but we didn't do, but we learned from our mistakes and we correct our ommissions. . . .

The Respondent's counsel, Herbert Burstein, then told the gathered employees,

> . . . some of you may feel that promises were made in the past that have not been fulfilled and that's probably true.
>
> That's probably true, but starting as of April of this year, when the company had a series of programs scheduled together, I was obliged to tell them don't do anything because we will wind up with extraordinary delay, picket lines, disruption, interference with the company's workers and the jobs of the people.

Burstein advised that the Respondent could do nothing at this time concerning "greater rewards" to the employees for "better productivity" because ". . . the moment the company offers to improve any condition, the union files a complaint. . ." He continued that the Respondent,

> . . . has got to look into wage structures, labor guide classifications, methods of improving opportunities, but here again, the company must be silent. There isn't a thing we can do because if we were to attempt to put into effect the programs which have been considered, we would be facing endless lawsuits in the court. . . I can't say to you what the company proposes to do because the moment we tell you that we'll wind up in a rankle in warfare in the courts and in the Board. . . .

It is inescapable from the above that the Respondent, through its statements in these speeches, communicated to its employees the implied promise that improvements in their terms and conditions of employment would be forthcoming, albeit presently forestalled due to the Union, once the problem of union representation was resolved in favor of the Respondent's acknowledged opposition thereto. Its main purpose, when considered along with the Respondent's other unfair labor practices committed herein, could only have been to preclude the Union from organizing its employees and to influence the outcome of the subsequently scheduled election in the Respondent's favor. 390/ I therefore find and conclude that the Respondent by promising to grant its

390/ Underlying the remarks made by Rizzuto and Burstein at this meeting is the inference that it would be futile for the employees to select a union to represent them because it could not secure any improvement in their terms and conditions of employment. Paoli Chair Co., Inc., 231 NLRB 539 (1977).

employees improved benefits under the circumstances present herein violated Section 8(a)(1) of the Act. 391/

The Respondent again alleges in its brief that the above statements are protected under Section 8(c) of the Act. It cites many cases to support this allegation. However, the Respondent's contention is untenable for the same reasons set forth above in the section of this decision entitled "Threats and Warnings." In substance and as the Supreme Court set forth in N.L.R.B. v. Gissel Packing Co., supra, ". . . an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' /Emphasis added./" Implicit in every speech given by the Respondent's representatives at any of the meetings it held with its employees were promises of benefits and/or threats of reprisals specifically designed to discourage union activity or sympathy on the part of its employees.

The evidence herein further establishes that betweeen June 1, 1977 and December 7, 1977 the Respondent granted the following benefits to its employees: enlarged its plant cafeteria and introduced hot food and cafeteria style service therein; provided an additional drinking fountain near the production area; provided gloves for women assembly line workers; implemented a system whereby employees bid for jobs in enhancement of a policy of promotion from within; implemented standardized forms for employee termination and layoff and a policy requiring supervisory documentation of employee termination; implemented standards for employee wages and a system of supervisor performance ratings of employees; implemented a system of allocating employee parking spaces on the basis of seniority; instituted a periodic Conair newsletter; established an employee credit union; instituted employee "social clubs" for bowling, skating and baseball; instituted employee informational meetings with its Vice President John Mayorek and Personnel Director Arthur Marin; improved safety procedures in the plant; hired a bilingual registered nurse and a bilingual personnel director to listen to and resolve employees problems and complaints. 392/

391/ Commercial Management, Inc., d/b/a Continental Manor Nursing Home, 233 NLRB 665 (1977); Hanover House Industries, Inc., 233 NLRB 164 (1977); Hubbard Regional Hospital, 232 NLRB 858 (1977); Planters Peanuts, A Division of Standard Brands, Inc., 230 NLRB 1205 (1977); The Buncher Company, 229 NLRB 217 (1977); Baker Manufacturing Co., Inc., 218 NLRB 1295 (1975), enf. 97 LRRM 2110 (C.A. 5, 1977); Chris & Pitts of Hollywood, Inc., 196 NLRB 866 (1972).

392/ It should be noted that many of these benefits granted by the Respondent have their origin in the complaints raised by employees during the meetings held by the Respondent during the week of April 4, 1977 and thereafter; for example: the employees complained about the unfair discharge of a fellow employee, resulting in the requirement of supervisory documentation for termination; female employees raised complaints concerning injury to their hands due to production line work and that the plant's drinking water fountain was situated too far from the assembly lines, whereupon the Respondent purchased and distributed gloves to protect assembly line employees' hands and installed an additional water fountain in its plant production area nearer the assembly lines.

Additionally, the Respondent gave all its unit employees a five pound canned ham, an Easter card and a tote bag on April 7, 1977 for the Easter holiday. Never before had the Respondent presented its employees with gifts for the Easter holiday.

In N.L.R.B. v. Exchange Parts Co., 375 U.S. 405 (1964) the Supreme Court held that an employer violates Section 8(a)(1) of the Act where, to discourage union support, it grants benefits to its employees subsequent to the commencement of a union organizational campaign and while an election is pending. The Court stated therein:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

The Supreme Court further held in that case that although other unlawful conduct may be an indication of the motive behind the grant of benefits while an election is pending, the absence of such other unlawful conduct or more obvious violations does not free the employer to violate Section 8(a)(1) of the Act.

Significantly, many of these benefits were granted within a few months after the Respondent had expressly promised its employees to adjust their grievances pertaining to some of these very same benefits and in response to the Union's organizational campaign. Further, the grants of benefits were made over a particularly crucial period of time encompassing the strike and the post-strike pre-election period even though the Respondent admittedly acknowledged to its employees during this time its awareness of the unlawfulness of such action.

From the above I am inescapably drawn to the conclusion that the benefits granted to its employees, by the timing, extent and nature thereof, were made in fulfillment of the Respondent's unlawful promises to adjust its employees' grievances. Additionally benefits were granted to reward those employees who had rejected the Union and to induce those employees (especially after the strike concluded and during the period before the election) who maintained their desire for union representation, to renounce the Union then and for the future in order to frustrate union activity amongst its employees forever.

The Respondent alleges that many of the increased or new benefits granted constituted only superficial changes in the employees' terms and conditions of employment. I do not agree and the evidence clearly shows otherwise. These benefits were substantial in nature especially when considered as a whole, and most importantly resolved various actual employee complaints or grievances which had created "unrest" at the Respondent's plant leading to the desire for union representation. Concerning this it appears in truth that the only benefit not granted in this respect, although promised by the Respondent after the Union was no longer a problem, was a wage increase.

From all of the foregoing I find that the granting of benefits to its employees by the Respondent especially when viewed in the context of its other extensive unfair labor practices was motivated by a desire to dissuade its employees from supporting the Union then or in the future and thereby violates Section 8(a)(1) of the Act. 393/

4. Interrogation of Employees Concerning Their Union Activity and Support

The second amended complaint herein alleges that the Respondent interrogated its employees concerning their membership in, activities on behalf of and sympathy for the Union in violation of Section 8(a)(1) of the Act. The Respondent denies this allegation.

Analysis and Conclusions

As the credited testimony herein shows, on April 2, 1977, Ann Gere, the chief assembly line supervisor, asked employee Carlos Cruz if he had signed a union authorization card and if he knew of any other employees who had done so. Gere additionally queried Cruz about the meeting at the union hall in Perth Amboy. Cruz responded by denying having signed a union card or knowing any employees who had and while acknowledging to Gere that he had heard about the union hall meeting denied to her that he had attended it. On April 5, 1977 Gere again interrogated Cruz as to whether or not he had signed a union authorization card, to which Cruz responded "No." Gere then told Cruz that someone had told her that Cruz had signed a card and that he "better watch out." 394/

On April 6, 1977, William Reed, the warehouse manager, asked one of his departmental employees, Stephen Olah, whether Olah had signed a union authorization card the day before in the Respondent's parking lot to which Olah responded that he had not. 395/ Reed told Olah that "someone" had seen Olah talking to one of the Union's representatives and asked Reed if Olah had signed a card. Olah again denied having done so. Reed then advised Olah to be careful. 396/

393/ N.L.R.B. v. Exchange Parts Co., supra; Highview, Incorporated, 231 NLRB 1251 (1977); Bartlett-Collins Co., 230 NLRB 144 (1977); L. H. & J. Coal Company, Inc., 228 NLRB 1091 (1977); Alvin Metals Co., 212 NLRB 707 (1974); Pure Chem Corporation, 192 NLRB 681 (1971). Concerning the Easter gifts, also see Baker Brush Co., Inc., 233 NLRB 561 (1977).

394/ Cruz actually did sign an authorization card for Local 222 on April 1, 1977 and an authorization card for Local 102 on March 30, 1977.

395/ Olah signed an authorization card for Local 222 on April 5, 1977.

396/ The General Counsel in its brief requests that the inference be drawn that Reed interrogated all of the Respondent's warehouse employees concerning their union activities because Reed admitted that he knew that Olah was the only union supporter among the warehouse employees. Reed's knowledge of Olah's support of the Union gives rise to various different inferences and the evidence herein does not support any one more strongly than another; therefore no inference will be drawn therefrom. The evidence shows that other warehouse employees had also signed union authorization cards.

Further, Mayorek testified that the Respondent obtained approximately 30-50 affidavits from employees concerning incidents they were involved in while the strike was in progress. Gustavo Rodriguez, an employee witness for the Respondent, testified that when he gave his affidavit to the Respondent, Mayorek asked him if he had signed a union authorization card. Mayorek denied asking any of the employees who gave affidavits to the Respondent anything about their union activity. Linda Murray, Mayorek's secretary, the clerical employee who took many of these statements, testified that the employees were asked only to relate what happened and nothing more. Aside from Rodriguez and perhaps the implication inherent in the testimony of employee Jose Cruz, there is no other evidence in the record to indicate that the Respondent, through its representatives or agents by means of these affidavits, interrogated its employees concerning their union activities or sympathies. It seems significant that apparently only employees who were involved in incidents with the pickets outside the plant or elsewhere were asked to give affidavits. Be that as it may, the Respondent did ask at least one, if not two, of its employees about his union sympathies or activities when procurring these affidavits.

The evidence additionally shows that during the strike, Nancy Rodriguez, an assembly line supervisor, asked various employees on her line if they had signed authorization cards on behalf of the Union and whether they had attended any union meetings.

On the day of the election, December 7, 1977, Ann Gere asked all the assembly line employees whether or not they voted in the election. Considering Gere's known position in opposition to union representation because of her stated belief that if the Union came in the Respondent would close the Edison plant and move to Hong Kong, and her high-level supervisory status, her action in this respect could well be interpreted by the employees as an edict by the Respondent to vote in the election against the Union. When considered in the light of the Respondent's other coercive conduct her actions can only constitute unlawful interference.

The basic premise in situations involving the questioning of employees by their employers about union activities is that such questions are inherently coercive by their very nature, and therefore violative of the Act " because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." 397/

However, as the Board stated in P. B. & S. Chemical Company, 224 NLRB 1, 2 (1976):

> . . . the basic premise in situations involving the questioning of employees by their employer about union activities is that such questions are inherently coercive by their very nature. We have however, held that in certain circumstances, employers may have a legitimate purpose for making a particular inquiry of employees which may involve, to some limited extent, union conduct. See, e.g., Johnnie's Poultry Co. and John Bishop Poultry Co., Successor, 146 NLRB 770 (1964), enforcement denied 334 F.2d 617 (C.A. 8, 1965).

397/ N.L.R.B. v. West Coast Casket Co., Inc., 205 F.2d 902, 904 (C.A. 9, 1953).

In this case the Respondent offered no legitimate reason nor can I find any legitimate purpose for such interrogation or questioning of its employees, 398/ other than that it was done, when considered in the light of the Respondent's other actions herein, for the purpose of coercing its employees into renouncing the Union. Various accompanying remarks made by the Respondent's representatives in these conversations wherein the interrogation occurred overwhelmingly support this. 399/ Further, the Respondent, while interrogating its employees, gave them no assurances against reprisals 400/ and at least Green's interrogation of the service department employees was conducted in that department manager's office, the "locus of managerial authority." 401/

It should also be noted that in response to the interrogation by the Respondent's representatives, employees Olah and Rodriguez denied having signed union authorization cards. The Board has held in similar circumstances that employees' denials of union involvement show the actual coercive effect of the Respondent's interrogation and the fear of reprisal that acknowledgement might engender. 402/

The test applied in determining whether a violation of Section 8(a)(1) of the Act has occurred is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the exercise of employee rights under the Act." 403/ Applying that test I find that the Respondent, by interrogating its employees as set forth above, has interfered with, restrained and coerced its

398/ Jefferson National Bank, 240 NLRB No. 160 (1979); World Wide Press, Inc., 242 NLRB No. 40 (1979).

399/ During the conversation Ann Gere had with Carlos Cruz in which she interrogated Cruz as to his union sympathies, Gere told Cruz that she was apprised that he had signed a card and that he "better watch out." When William Reed questioned Stephen Olah about his having signed an authorization card Reed advised Olah to be careful if he had. These statements themselves are violative of Section 8(a)(1) of the Act as being implied threats of reprisal should those employees engage in any union activity or support the Union as hereinbefore stated.

400/ Thermo Electric Co., 222 NLRB 358, enfd. 94 LRRM 2947 (C.A. 3, 1976); N.L.R.B. v. Cement Transport, Inc., 490 F.2d 1024, 1028 (C.A. 6, 1974), cert. denied 419 U.S. 828, 95 S. Ct. 47 (1974); Trinity Memorial Hospital of Cudahy, Inc., 238 NLRB No. 107 (1978).

401/ Meehan Truck Sales, Inc., 201 NLRB 780, 783 (1973).

402/ O & H Rest., Inc., Trading as the Backstage Restaurant, 232 NLRB 1082 (1977).

403/ Electrical Fittings Corporation, A Subsidiary of I-T-E Imperial Corporation, 216 NLRB 1076 (1975).

employees in the exercise of their rights guaranteed in Section 7 of the Act and has thereby violated Section 8(a)(1). 404/

5. Impressions of Surveillance

The second amended complaint herein alleges that the Respondent created among its employees the impression that their activities on behalf of the Union or any other labor organization were being kept under surveillance. The Respondent denies this allegation.

Analysis and Conclusions

As stated hereinbefore, Ann Gere, chief assembly line supervisor told employee Carlos Cruz on April 5, 1977, that someone had told her that Cruz signed an authorization card for the Union and "he better watch out." On April 6, 1977 employee Stephen Olah was told by his supervisor William Reed, the warehouse manager, that "someone" had seen Olah talking to a union representative and if Olah had signed a union authorization card he should "just be careful." Further, the record shows that the Respondent took video tapes during the course of the strike, from approximately April 13 or 14, 1977 until it ended on September 23, 1977, of strikers on the picket line, of employees entering and leaving the Conair plant and of trucks and automobiles in and around the Respondent's premises.

In determining whether a respondent created an impression of surveillance, the test applied by the Board is whether employees would reasonably assume from the statements or actions in question that their union activities had been placed under surveillance. 405/ In considering the above statements I find that such an assumption is reasonable. The statements in these instances were not in the nature of rumor but of positive fact and well could give the employees involved the impression that their activities were under surveillance. 406/ I can think of no instance under the circumstances present in this case where employees who learn that their action (on the picket line or on the jobsite) are videotaped, would not have the impression that their activities were under surveillance. Significantly, Mayorek testified that the video camera was obtained not only to record incidents on the picket line, but also to indicate which employees were entering and leaving the plant.

In view of the above, I find and conclude that the Respondent, by its above actions, created the impression among its employees that their activities

404/ Capital Records, Inc., 232 NLRB 228 (1977); Calcite Corporation, 228 NLRB 1048 (1977) enf. 83 LC 10367 (C.A. 9, 1978); Dreamland Bedding, 221 NLRB 1082, 1086 (1975); M & J Trucking Co., Inc., 214 NLRB 592, 594-595 (1974), enf. 93 LRRM 2336 (C.A. 9, 1976); Swanson Nunn Electric Company, Inc., 203 NLRB 213, 214 (1972).

405/ Schrementi Bros., Inc., 179 NLRB 853 (1969).

406/ Contrast, G.C. Murphy Company, 217 NLRB 34, 36 (1975).

on behalf of the Union were under surveillance and thereby violated Section 8(a)(1) of the Act. 407/

6. Additional Violations

Moreover, the evidence herein shows that George Zadroga, whom I previously found to be an agent of the Respondent within the meaning of the Act, caused various of the Respondent's employees to remove and discontinue wearing union campaign badges containing the words "Vote Union" thereon. By this action, Zadroga interfered with the right of these employees to wear such campaign insignia and thereby violated Section 8(a)(1) of the Act. 408/

The evidence herein shows that in June 1977 certain of the striking employees returned to work pursuant to the Respondent's June 9, 1977 letter. At the time that these employees reported for work they were made to sign statements, indicating their intent to return to work, as a condition to reinstatement. This condition, made in its offer of reinstatement to these striking employees, is an action violative of Section 8(a)(1) of the Act. 409/ Further, one of the returning striking employees was advised that he would be returning to work as a new employee. This was also in violation of Section 8(a)(1) of the Act. 410/

D. Reinstatement and Discharge of the Striking Employees

Section 8(a)(3) of the Act prohibits an employer from discriminating against its employees in regard to hire, tenure and other terms and conditions of employment for the purpose of encouraging or discouraging membership in a labor organization.

The second amended complaint herein alleges that the Respondent failed and refused to reinstate various of its employees who had engaged in a strike and subsequently made unconditional offers to return to their former, or substantially equivalent positions of employment, in a timely and prompt manner; failed and refused to reinstate other employees at all; and subsequently discharged some of these employees because they joined or assisted the Union and engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, in violation of Section 8(a)(3) and (1) of the Act. The Respondent denies these allegations. Further in its brief, the Respondent maintains that "the Union's violent conduct and wholesale coercion of employees" made the strike "illegal" and that therefore those employees who joined the strike ratified the Union's unlawful actions and "forfeited the protection of Section 7" of the Act, and their right to reinstatement.

407/ South Shore Hospital, 229 NLRB 363 (1977), enf. in pertinent part 97 LRRM 3004 (C.A. 1, 1978); Richlands Textile, Inc., 220 NLRB 615, 625 (1975).
408/ Highview, Incorporated, 231 NLRB 1251 (1977).
409/ Scalera Bus Service, Inc., 210 NLRB 63, 64 (1974); Pepsi-Cola Bottling Company of Topeka, Inc., 227 NLRB 1959, 1964 (1977); Fugazy Continental Corp., 231 NLRB 1344 (1977).
410/ Bromine Division, Drug Research, Inc., 233 NLRB 254 (1977).

Analysis and Conclusions

The Unfair Labor Practice Nature of the Strike

As hereinbefore set forth, the Respondent's employees engaged in a strike from April 11, 1977 to September 23, 1977. The General Counsel asserts that the concerted work stoppage by the Respondent's employees was an "unfair labor practice strike." The Respondent contends it was an "illegal strike."

According to the undisputed testimony herein on April 6, 1977, a group of the Respondent's employees (approximately 25-30) appeared at the "union hall" demanding the return of their signed authorization cards because they feared losing their jobs at Conair. They advised the Union that the Respondent had held "several meeting with them that week," and had threatened its employees with the loss of benefits they presently enjoyed which now would only be granted to employees who did not join the Union, and that if the Union successfully organized the Respondent's Edison plant, the Respondent would close shop and move to Hong Kong. Jerry Rivera, a union official, told them that the Respondent's conduct was illegal, that the Union could file unfair labor practice charges with the Board against the Respondent, and that he would discuss what was happening with the Union's district manager, Hugh Harris, and advise them about what was proposed.

During the late afternoon of April 7, 1977, the Union held a meeting at its hall in Perth Amboy with 50-60 of the Respondent's employees, wherein the employees reiterated to Harris what they had told Rivera the previous day. Harris explained that the Respondent's actions were illegal and that one of the courses of action that could be taken in response to the Respondent's unlawful conduct was the calling of an unfair labor practice strike. Harris and Rivera both testified that the employees "responded enthusiastically" to this suggestion and indicated that a majority of the Respondent's employees would support such a strike. Harris told the employees that the Union would "examine the best procedure" to follow and the meeting was concluded.

The next day, Friday, April 8, 1977, the Union's reprsentatives met among themselves and decided to commence a strike action on Monday, April 11, 1977. Picket signs were printed in preparation for the strike and used during the course thereof, which stated:

> Workers of Conair on Strike - Unfair Labor Practices --
> Please don't cross picket line! -- International
> Ladies Garment Workers Union, AFL-CIO, Local 222.

On the morning of April 11, 1977, representatives of Local 222 appeared at Conair and informed the Respondent's employees that there was an unfair labor practice strike in progress. 411/ Approximately 125-140 of the Respondent's

411/ It is insignificant that the unfair labor practice strike started without advance notice to the employees. See, Maywood Plant of Grede Plastics, A Division of Grede Foundries, Inc., 235 NLRB 363 (1978).

bargaining unit employees joined the strike that morning. At no time prior to April 11, 1977 did any agent of the Union request that the Respondent recognize Local 222 as the collective-bargaining representative of its production and maintenance employees.

The strike by the Respondent's employees was an unfair labor practice strike from its inception. An unfair labor practice strike is activity initiated in whole or in part by employees in response to unfair labor practices committed by their employer. 412/ The undisputed evidence establishes that but for the Respondent's antecedent unfair labor practices committed during the week of April 4, 1977 immediately preceding the strike, Local 222 would not have engaged in its strike to protest the Respondent's unlawful conduct. 413/

The evidence shows that by mailgram and by letter dated September 21, 1977, Local 222 notified the Respondent that the strike would end on Friday, September 23, 1977 and that the Union was making an unconditional offer on behalf of each and every striking employee to return to work on the morning of Friday, September 23, 1977. 414/ The Respondent, in both its brief and reply brief asserts that:

> Furthermore, the company was entitled to rely on the clear language of the offer submitted by their /striking employees/ representative to ". . . return to work on the morning shift of Friday, September 23, 1977 or as soon thereafter as employment is available." /Emphasis added./ The Company acted in good faith to reinstate the strikers in an orderly fashion . . . .

However, in Southwestern Pipe, Inc., 179 NLRB 364, 382 (1969) the Board found a virtually identical offer to return to work at the conclusion of the unfair labor practice strike to be unconditional and valid in all respects. More will appear hereinafter concerning the Respondent's alleged good faith in reinstating its striking employees.

On the morning of September 28, 1979, all the striking employees 415/ reported for work at the Respondent's plant and were refused entry thereto by the

412/ N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938); Jimmy Dean Meat Company, Inc., of Texas, 227 NLRB 1012 (1977).

413/ Maywood Plant of Grede Plastics, A Division of Grede Foundries, Inc., supra. Also, it should be noted that various of the Respondent's managerial and supervisory employees testified that they learned on the first day of the strike that there was an "unfair labor practice strike" in progress. See the testimony of John Raab and Richard Escala.

414/ See, Jimmy Dean Meat Company of Texas, 227 NLRB 1012 (1977); W.C. McQuaid, Inc., 220 NLRB 593 (1975), enf. in pertinent part 552 F.2d 519 (C.A. 3, 1977); Colonial Nursing Home, Inc., 218 NLRB 1007 (1975). The Board stated in Colonial Nursing Home, Inc., supra, "The principal is well settled that a union can make a collective offer to return to work for all striking employees . . . ." For the striking employees names see footnote 73, supra.

415/ See footnote 73, supra.

Respondent's security guard, Tom Thomas, who informed them that they no longer worked at Conair, were new employees and as such would be required to fill out job applications with the Respondent's personnel department when it opened at 9:00 a.m. that morning. When John Mayorek, the Respondent's vice president for administration appeared at the plant thereafter he confirmed what Thomas had previously told the striking employees and further advised them that the job applications which they were required to prepare as "new" or "former" employees would be considered by the Respondent and when job openings became available the Respondent would notify them accordingly. Mayorek explained that this was made necessary because there were no positions open at the time since the Respondent had hired replacements for all the strikers and would not discharge any of these newly hired employees in order to reinstate the strikers. 416/

The Respondent admits that the strikers were all required to, and did in fact, submit employment applications as a precondition to their reinstatement. Further, the Respondent admits that no striker was offered reemployment until this condition was complied with. 417/

416/ These statements made by Thomas, Mayorek and, as the record discloses, Ann Gere, the Respondent's chief assembly line supervisor, to and about the striking employees as being "new" or "former" employees constitute violations of Section 8(a)(1) of the Act, as they imply that the strikers would lose their seniority rights and other benefits if and when they were reinstated. See, Bromine Division, Drug Research, Inc., 233 NLRB 253 (1977).

417/ While the Respondent alleges that it required the strikers to fill out new employment applications, mainly in order to update the information on these employees in their personnel files, the evidence does not support this. Admittedly, it is the Respondent's practice to require new employees to fill out such employment application forms. The Respondent also admitted that the usual procedure previously employed to update such employee information in their personnel files, was to call them in to the personnel department and receive this information first hand. The Respondent did not explain why the updated information had to be submitted in the form of a newly filled-out job application when it could have been conveniently obtained from the strikers personally by summoning them to its personnel office when they were reinstated as admittedly the Respondent had done in the past. It is obvious that the main reason for the Respondent's action was one of retaliation against the strikers for supporting the Union, albeit the updating of its files concerning any strikers who were reinstated could have been ancillary thereto. What occurred also gives rise to the inference that the Respondent used this procedure to serve another pernicious reason, that this action should serve as a vivid reminder to the newly hired replacement employees, those employees who had not supported the strike but who sympathized with the Union, and any of the strikers who might be reinstated, that the penalty for union activity and support was the possible loss of their job. In view of the above, the condition that new employment applications be prepared and filed by the strikers as a prerequisite to reinstatement constituted unlawful retaliation for protected activity and was therefore violative of Section 8(a)(1) and (3) of the Act. See Pepsi-Cola Bottling Company of Topeka, Inc., 227 NLRB 1959 (1977); see also, Woodlawn Hospital, 233 NLRB 782 (1977); Fugazy Continental Corp., 231 NLRB 1344 (1977); Scalera Bus Service, Inc., 210 NLRB 63 (1974).

The Board has held that unfair labor practice strikers, upon their unconditional application to return to work, are entitled to immediate reinstatement to their former positions, or, if such positions no longer exist, to substantially equivalent positions without impairment of their seniority or other rights and privileges, even if it is necessary for their employer to discharge persons hired as replacements on or after the date the strike began. 418/

As the Board stated in Bromine Division, Drug Research, Inc., 233 NLRB 253, 260 (1977):

> In order to demonstrate compliance with the foregoing principle, an employer must present probative evidence showing a good-faith effort to communicate such an offer /of reinstatement/ to the employee . . . /and/ must show that he has taken all measures reasonably available to him to make known to the striker that he is being invited to return to work. J. H. Rutter-Rex Manufacturing Company, Inc., 158 NLRB 1414, 1524 (1966).

The law is also "clear that a discriminatee is entitled to a reasonable period of time in which to consider a reinstatement offer." 419/

The mailgrams which the Respondent caused to be sent to the unfair labor practice strikers did not constitute valid offers of reinstatement for two reasons. First, the dates on which the strikers were told "to begin work," October 4, 1977 to November 7, 1977, ranged from 1 to 4 days from the date that the mailgrams were sent by the Respondent. As could be reasonably expected by the Respondent, some of the strikers received mailgrams after the date on which they were to report for work. Thus, the offers were defective in that the Respondent failed to give strikers a "reasonable period of time in which to consider" their reinstatement offers. 420/

Additionally and significantly, these mailgrams were in English only. As indicated hereinbefore, approximately 75 to 80 percent of the Respondent's employees are Spanish speaking. The Respondent, by its own admission, was aware that many of its employees would be unable to understand or act upon a notice or letter in English only and therefore had always maintained a policy of providing a Spanish translation in its communications, both orally or in writing, with its employees. This policy was followed by the Respondent both before and after the reinstatement mailgrams were sent to the strikers in October and November, 1977. 421/ The Respondent's unexplained reason for deviating from its policy can

418/ Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270 (1956); N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333; C & E Stores, Inc., C & E Supervalue Division, 229 NLRB 1250 (1977).

419/ Freehold AMC-Jeep Corp., 230 NLRB 903 (1977); National Tape Corporation, 187 NLRB 321, 324-325 (1970).

420/ Footnote 419, supra.

421/ See, for example, the April 20, 1977 mailgrams and the June 9, 1977 letters from the Respondent to the striking employees and the Respondent's campaign literature. General Counsel's Exhibits 4-1, 7 and 75(a-b).

only be considered as deliberate and done to create difficulties for these employees. The above evidence clearly supports the finding that the Respondent acted in bad faith and failed to take "all measures reasonably available to make known to the strikers that /they were/ being invited to return to work." 422/

The Reinstated Strikers

The record shows that 81 of the strikers responded to the mailgrams and were reinstated to their former jobs on the various dates hereinbefore enumerated. 423/ Since the Respondent continued to employ the replacement employees from September 26, 1977, 5 days after the strikers' unconditional offer to return to work, until the date on which each of them resumed his or her employment, the Respondent unlawfully discriminated against each of the 81 unfair labor practice strikers in violation of Section 8(a)(1) and (3) of the Act, and I so find. 424/

422/ Footnote 419, supra.

423/ Lucille Allen, Maria Arocho, Rosita Cruz, Christsina De Armas, Florence L. Heinbach, Carmen Irizzary, Florence F. Jacko, Beulsh Joves, Flora F. Kurtanick, Dorothy Lodato, Victor Maisonet, Irene Martinez, Laura Martinez, Miliady Mendez, Louis B. Ortiz, Yillian T. Perez, Ana Santiago, Carmen M. Sagardia, Rosaura Soto, and Ismael Torrres on October 4, 1977;

Hector Caraballo, Hilda Della Torres, Margarita Gautier, Carmen Lopez, Luz M. Melendez, Hilda Perez, Alicia Rivera, and Jose R. Rivera on October 11, 1977;

Genovena Arocho, Olga Chalfa, Patricia Eaford, Rosaria Machin, Rosalia Mendez, Jose Negson, Antonio Nerro, Julia Pellallera, Lilia Quiles, Arvilda Rodriguiz, Jose Santiago, Aida Iris Torres, Alberto Vargas, and Elsie Vega on October 12, 1977;

Adamina Nieves, Virginia Rivera, Rufina Saez, Portinia Soto, and Rafael Valdes on October 14, 1977;

Mayes Garcia, Gloria Guzman, Juan Hernandez, Roberto Mercado, Elizabeth Muniz, Wadilia Santiago, and Feliz Vasquez on October 18, 1977;

Miquel Aquino, Celia Cruz, Celia Febles, Wilfredo Guerrero, Alice Jones, Noraima Mendez, Marth Parada, Jose Vazquez, and Wilfredo Vazquez on October 19, 1977;

Etta Burns, Hiriam Guzman, and Carmen Samson on October 24, 1977;

Michael Billings, Dominga Cruz, Martha Davison, Evelyn Lee, Annette Palmer, and Denise Perrote on November 2, 1977;

David Letendre, Richard Letendre, Raymond Crespo, and Ana Rose Fernandez on November 7, 1977.

424/ Drug Package Company, Inc., 228 NLRB 108, 113-114 (1977); Kayser-Roth Hosiery Company, Inc., 187 NLRB 566 (1970). The Board stated in Drug Package Company, Inc., supra:

> We believe that the 5 day period is justified as providing a reasonable period of time for employers to accomplish those administrative tasks necessary to the orderly reinstatement of the unfair labor practice strikers and to accord some consideration to the replacement of employees who must be terminated.

(continued)

The Respondent asserts that the striking employees were offered substantially equivalent work at the same rate of pay they received prior to the strike. While this is substantially true of most of the reinstated strikers, it is untrue as to a few others. Palmer, Perrote, Letendre, Billings and Lee, were employed in the Respondent's service department prior to the strike. When each of these employees initially reported to work on various dates in October, 1977, pursuant to the mailgrams they had received, the Respondent offered them jobs, on the assembly line, instead of reinstatement to their service department jobs, which the employees refused to accept, albeit the level of pay would have been the same. 425/ Subsequently they were offered their jobs back in the service department in early November, 1977.

The evidence shows that service department and assembly line jobs are different; in fact, service department jobs are more desireable. Additionally employees are usually transferred from assembly line positions into the service department and not the reverse. Although the Respondent did offer these employees the same salary as they had previously received this was not an offer of substantially equivalent employment and the Respondent thereby violated Section 8(a)(1) and (3) of the Act. 426/

Further, when the striking employees resumed their employment with the Respondent they were required to report to either the personnel department or the plant cafeteria to fill out insurance and tax forms. The Respondent thus placed further conditions on the reinstatement of these employees and thereby violated Section 8(a)(1) and (3) of the Act. 427/

The Respondent also placed the words "new hire" on the timecards of at least 22 of the reinstated strikers during October and November 1977, and also

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424/ The Board also stated at page 113-114, no. 28, that "administrative difficulties are not a basis for delay beyond the 5 day period," and at page 114, that although in some cases the 5 day period may be more or less than ample, the 5 day rule will still apply because "the costs and uncertainties in such litigation would far outweigh the benefits to be derived." Accord, John Kinkel & Son, 157 NLRB 744 (1966); Universal Food Service, Inc., 104 NLRB 1, 16 (1953).

425/ When these employees refused the assembly line jobs they were requested to sign statements to that effect by Arthur Marin, the Respondent's personnel director. This constituted a violation of Section 8(a)(1) of the Act, and I so find. See, Pepsi-Cola ;Bottling Company of Topeka, Inc., 227 NLRB 1959 (1977).

426/ De Loreau Cadillac, Inc., 231 NLRB 329 (1977); Drug Package Company, Inc., supra.

427/ Woodlawn Hospital, 233 NLRB 782 (1977); Fugazy Continental Corp., 231 NLRB No. 175 (1977); Pepsi-Cola Bottling Company of Topeka, Inc., 227 NLRB 1959 (1977), Scalera Bus Service, Inc., 210 NLRB 63 (1974).

changed the original dates of hire on some of the strikers' personnel records to the date of reinstatement following the strike. The Respondent thereby violated Section 8(a)(1) and (3) of the Act by apparently rehiring the strikers without their accrued seniority rights. 428/ The Respondent alleged that the words "new hire ins" were actually placed thereon and, although these words do appear on the timecards, testimonial evidence suggests that the word "ins" was added subsequently to provide an explanation for the Respondent in an attempt to negate its unlawful conduct in this respect.

The Non-Reinstated Strikers

The Respondent failed and refused to offer reinstatement to strikers Gertrudes Rodriguez, Shirley Bagby, Adrian Pagan, and Lydia Gonzalez because they were guilty of "misconduct." The only evidence presented by the Respondent concerning this is a certified document from the Municipal Court of Edison, New Jersey which indicates that each of these employees were charged with "malicious damage" on either April 11 or 12, 1977 and pleaded guilty to violating an Edison Township Ordinance, ("obstructing passage of motor vehicle") on either September 26, 1977 or November 10, 1977. There is no record evidence that any of these four employees engaged in picket line misconduct at any time during the strike.

The Respondent alleges as a defense herein that the "strikers in this case forfeited the protection of Section 7 of the Act by participating in an illegal strike. The Union's violent conduct and wholesale coercion of employees made the action illegal, and freed the employers to take necessary actions, including dismissal, to protect the safety of individuals and property. The Act does not protect strikers engaged in unlawful activity." 429/

The Board has held that an employer's honest belief, albeit mistaken, that certain strikers have engaged in misconduct during the strike provides an adequate defense to a charge of discrimination in refusing to reinstate such employees unless the General Counsel affirmatively proves that the alleged conduct did not occur. 430/

However it is also well settled that although an employee may actually have engaged in misconduct, he or she may not be denied reinstatement absent a showing that the misconduct was so violent or of such a serious nature as to render the employee unfit for future service. 431/

It appears from the evidence herein that the Respondent relied solely upon the police arrest reports of the above strikers and their convictions in the

428/ See, Woodlawn Hospital, supra. The Respondent also violated Section 8(a)(1) of the Act by implying to the strikers that they would lose benefits as a result of their protected activity. See, Woodlawn Hospitals, supra; Bromine Division, Drug Research, Inc., supra.

429/ N.L.R.B. v. Fansteel Metalurgical Corp., 306 U.S. 240 (1939); N.L.R.B. v. Marshall Car Wheel and Foundry Co., 218 F.2d 409 (C.A. 1955).

430/ Rubin Bros. Footwear, Inc., 99 NLRB 610 (1952); Teamster Local 745 v. NLRB, 389 F.2d 553 (C.A., D.C. 1968).

431/ MP Industries, Inc., 227 NLRB 1709 (1977).

Municipal Court of Edison, New Jersey of Township Ordinances "obstructing passage of a motor vehicle." Despite the many witnesses called by the Respondent to testify to acts of violence committed during the strike, and the video tape recordings over the cause thereof, the Respondent failed to produce any evidence which would show that these employees personally engaged in any picket line misconduct.

Additionally the Board in Seminole Asphalt Refining, Inc., 207 NLRB 167 (1973), enf. denied 497 F.f2d 247 (C.A. 5, 1974), at page 168 stated:

> Although this conduct is not to be condoned it was not flagrant in our opinion as to disqualify these two unfair labor practice strikers from reinstatement when considered against Respondent's unfair labor practices particularly the discriminatory layoff of several employees which provoked the unfair labor practice strike. 432/

A similar factual situation raising the same legal issues in the context of an unfair labor practice strike was presented to the Board in Bromine Division, Drug Research Inc., 233 NLRB 253 (1977). The pertinent portion reads as follows:

> Earl Stevens. Paterson testified that Stevens was not recalled because of "bad conduct" stemming from an occasion, around September 18 or 19, when he was arrested by the police at the plant. At the hearing, the parties stipulated that on November 24, Stevens pleaded guilty to two misdemeanors, "illegal entry without breaking" and "malicious destruction of personal property." Respondent's brief states, "As to Earl Stevens, he was in jail having pleaded guilty to malicious destruction of property of the corporation during the strike. The company feels that this is sufficiently serious misconduct not to recall him."
>
> It has been held that even in an unfair labor practice strike setting, "the burden of proving innocence of strike misconduct shifted to the general counsel upon proof of a good faith belief by the employer that such misconduct had occurred." Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745 v. N.L.R.B., 389 F.2d 533, 554 (C.A. D.C.), enfg. 161 NLRB 887, 911; Capital Rubber & Specialty Co., Inc., 201 NLRB 715, 721. This should mean, however, that, in order for the burden to shift, the employer must prove a good faith belief that the employee had engaged in conduct of sufficiently serious magnitude as would objectively disqualify him from the remedial rights ordinarily due him as an unfair labor practice striker. Respondent, however, failed to establish at the hearing the factual nature of the misconduct which it believed Stevens had engaged in. In the absence of such a showing, the burden should not shift.

432/ In this case the employer discharged two unfair labor practice strikers for throwing cherry bombs onto the plant premises on the day after the plant reopened.

But even if it be said that the burden has shifted, the only burden upon the General Counsel is to prove Stevens innocent of conduct which could be said to disqualify him. While Respondent had shown that it believed Stevens guilty of two misdemeanors, that is inadequate.

In Hendon & Company, Inc., 197 NLRB 813, 819, the Board held that proof that three strikers were "charged and convicted in a state court for assault and battery upon one Carter, presumably a nonstriking employee," was, in the absence of litigation of the incident at the hearing, insufficient to deprive the strikers of their reinstatement rights. Accord, N.L.R.B. v. Cambria Clay Products Company, 215 F.2d 48, 54 (C.A. 6). In the present case, I know nothing more of the Stevens convictions than the legal conclusions stated in the stipulation. It may be that the "illegal entry without breaking" and "malicious destruction of personal property" consisted of no more than walking through an open door for a few moments and, while there, breaking a pencil. In the absence of any detail and applying the principle of Hendon & Company, Inc., supra, I must conclude that the record does not support a finding that Stevens forefeited his right to reinstatement, and I so find.

Similarly, the record herein does not support a finding that Bagby, Rodriguez, Pagan and Gonzalez forfeited their rights to reinstatement. In view of all of the above I find and conclude that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to offer them reinstatement at the conclusion of the strike. Even assuming, arguendo, that the Respondent did honestly believe that these employees were guilty of misconduct on April 11 or 12, 1977, there is uncontradicted record evidence that Respondent voluntarily, and knowingly sent them mailgrams dated April 20, 1977 and letters dated June 9, 1977 offering them reinstatement. This might well constitute condonation of their actions. It is well settled that after condonation, an employer may not rely upon prior unprotected activities of employees to deny them reinstatement or otherwise discriminate against them. 433/

The Respondent additionally refused to reinstate Stephen Olah supposedly because he was arrested on the picket line on the evening of July 21, 1977, charged with resisting arrest and later pleaded guilty to loitering in violation of an Edison Municipal Township Ordinance. The evidence clearly establishes that Olah was innocent of any misconduct on the evening of July 21, 1977 which would effect his right to reinstatement. 434/ Even if it is assumed that the Respondent had a good faith belief that Olah engaged in misconduct, it violated Section 8(a)(1) and (3) of the Act by refusing to reinstate him as the evidence establishes that the misconduct, in fact, did not occur. 435/

433/ See, e.g., W.C. McQuaide, Inc., 220 NLRB 593, 610 (1975) enf. denied in pertinent part 552 F.2d 519, 94 LRRM 2950 (3rd Cir. 1977); Winn-Dixie Atlanta, Inc., 207 NLRB 290 (1973).

434/ See the testimony concerning his arrest and the video tape account thereof.

435/ See N.L.R.B. v. Burnup and Sims, Inc., 379 U.S. 21, 57 LRRM 2386 (1964); K-D Lamp Division, Concord Control, Inc., 228 NLRB 1484, n. 3 (1977).

Further, even if it is assumed that Olah did in fact "loiter" or "resist arrest," it would not cause him to forfeit his right to reinstatement. Misconduct which does not seriously damage property, intimidate nonstrikers or prevent them from entering the employer's property does not warrant discharge. 436/

The Respondent took no position with respect to two other unfair labor practice strikers which it failed and refused to reinstate, Luz Villanueva and Yvette Casquette. Neither of them received a mailgram or other communication from the Respondent offering them reinstatement following the strike. Inexplicably, the Respondent sent their mailgrams to incorrect addresses, although it admittedly had correct addresses for both of them. Even after the Respondent was apprised of the fact that neither of these employees had received a mailgram, it deliberately refused to send properly addressed offers of reinstatement to them. It is therefore clear that the Respondent violated Section 8(a)(1) and (3) of the Act by failing to validly offer Villanueva and Casquette reinstatement at any time after the conclusion of the strike. 437/

With respect to five other employees, Jesus Santiago, Jose Nunez, Adolfo Nunez, Enrique Luciano and Jose Mendez, the Respondent contends that none of them are entitled to reinstatement because they abandoned their employment with the Respondent. All of these employees returned to the plant during the strike, on Monday, June 13, 1977, after receiving the Respondent's June 9, 1977 letters which impliedly threatened them with discharge if they did not return to work. The Respondent violated Section 8(a)(1) and (3) of the Act by conditioning the reinstatement of Santiago and both of the Nunez brothers upon their signing statements that they "have returned to work on the above date (June 13, 1977) per the offer made by the Company's letter dated June 9, 1977."

The evidence shows that Santiago, originally employed as a material handler on the assembly line, was reinstated to a different job in the Respondent's service department 3 days before rejoining the strike on Friday, June 17, 1977. Jose Nunez was advised by Arthur Marin that he would be told when to report to work. He was never notified by the Respondent, and he returned to the strike the next day, June 14, 1977. Marin told Adolfo Nunez that he would not be given his old job back, that he would be starting as a new employee and that he should report for work on June 14, 1977, thus giving Adolfo Nunez a valid reason to reject the Respondent's offer of reinstatement. 438/ Nunez refused this offer and rejoined the strike the next day, June 14, 1977. Enrique Luciano and Jose Mendez also returned to Conair and spoke to Marin during that week. Luciano told Marin that he had not received the June 9, 1977 letter and asked if he still had his job. Marin told him to wait for receipt of the letter because without it he would not be reinstated. Neither Luciano nor Mendez were ever contacted by the Respondent and they therefore rejoined the strike.

436/ Seminole Asphalt Refining, Inc., supra.; Acker Industries, Inc., 184 NLRB 472, 483 (1970), enf. denied on other grounds 460 F.2d 649, 80 LRRM 2364 (C.A. 10, 1972).

437/ See, Bromine Division, Drug Research, Inc., supra.

438/ See Bromine Division, Drug Research, Inc., supra; DeLorean Cadillac, Inc., 231 NLRB 321 (1977). With this act, Marin violated Section 8(a)(1) of the Act.

All five of these employees continued to support the strike and picketed during the strike until it ended on September 23, 1977. There is no evidence that these employees at any time abandoned their employment or the strike. The Respondent, therefore, violated Section 8(a)(1) and (3) of the Act by refusing to offer them reinstatement upon their unconditional offer to return to work at the conclusion of the strike. 439/

Even though the evidence shows that the Respondent did send the April 20, 1977 mailgrams and the June 9, 1977 letter to Ernesto Soto directing him to begin work on specified days, these communications were invalid offers of reinstatement for the reasons discussed supra. The Respondent, by never offering Soto reinstatement thereafter, therefore violated Section 8(a)(1) and (3) of the Act. 440/

The Respondent also discharged three striking employees who had previously been reinstated, Jose Santiago, Ruby Toomer, and Carmen Sagardia. The evidence shows that Santiago was abruptly discharged on November 10, 1977 while he was on approved sick leave due to a serious head injury he sustained during work on or about October 17, 1977. Toomer was discharged without explanation on January 25, 1978 while she was on an approved extended sick leave. Sagardia was denied reinstatement on February 23, 1978, without explanation, at the conclusion of a relatively short leave of absence necessitated by illness in her family. The Respondent contends that these employees were discharged because they failed to return to work without proper notice to the Respondent after being granted legitimate leaves of absences.

By its own admissions, the Respondent has had in effect for years, a liberal leave of absence policy applicable to all its employees. There are repeated instances in the record of Respondent's granting extended leaves of absences for illness or other reasons to employees who, it seems, did not support Local 222. All of these employees had no difficulty in returning to work at the conclusion of their approved leaves of absence. Therefore, the Respondent's failure to accord the same liberality of treatment to Santiago, Toomer, and Sagardia constitutes disparate treatment and compels the conclusion that Respondent discriminated against them because of their support of the Union in violation of Section 8(a)(1) and (3) of the Act. 441/

439/ See, Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 278, 37 LRRM 2587 (1956); N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 2 LRRM 610 (1938).

440/ See Bromine Division, Drug Research, Inc., supra; Freehold AMC-Jeep Corp., supra. Further, while Mendez and Soto did not testify during the hearing, this does not prevent a finding of unlawful discrimination with respect to them. See, Riley Stoker Corporation, 223 NLRB 1146, 1147 (1976) enf. denied 96 LRRM 2106 (C.A. 3, 1977). Accord, Atlanta Flour and Grain Company, Inc., 41 NLRB 409, 416, n. 11 (1942), and cases cited therein.

441/ See, Lisa's Inc., 230 NLRB 492 (1977). See also, Carbone-Ferraz, Inc., 233 NLRB 219 (1977); Electric Hose and Rubber Company, 228 NLRB 966, 978-982 (1977); Head Ski Division, AMF, Inc., 222 NLRB 161, 171-173 (1976), enf. in pertinent part 564 F.2d 434, 95 LRRM 2821 (D.C. Cir. 1977). Further, the evidence presented by the Respondent's witnesses to justify its decision to (continued)

IV. Case No. 22-RC-7119

The General Counsel alleges that the unfair practices committed by the Respondent are so "outrageous and pervasive" as to warrant the setting aside of the results of the election held on December 7, 1977. The General Counsel also asserts that since many of the Respondent's unfair labor practices occurred after Local 222 filed its representation petition in Case No. 22-RC-7119 on April 13, 1977, and before the election was conducted on December 7, 1977, these unfair labor practices should be considered in determining whether the Respondent engaged in conduct affecting the results of the election and meriting the setting aside thereof.

The Respondent maintains that "If the results of the election are to be vacated, the violations upon which that decision is made must have occurred within 6 months of the date the objections were filed. . . . Accordingly, the conduct upon which its objections are based cannot antedate June 15, 1977." 442/ I do not agree.

As the Board stated in Goodyear Tire and Rubber Company, 138 NLRB 453, 453 (1966):

> It has always been the policy of the Board to encourage parties to a representation case to settle the issues in the case by mutual agreement wherever possible. . . . At the same time, the Board seeks to discourage improper conduct by employees or unions which occurs sufficiently close to the time of the voting and which therefore may interfere with the free choice of the employees in a Board-conducted election.
>
> We believe that these salutory policies can best be effectuated by establishing a common cutoff date both for formally directed elections in contested cases and for elections held pursuant to voluntary agreements. Clearly, objectionable conduct has the same impact on the employees' freedom of choice in an election regardless of whether the election is pursuant to a consent arrangement or formal direction. Where such conduct occurs after the filing of a representation petition, therefore, there is no sound reason for ignoring it or immunizing it simply because it occurs before a consent agreement or stipulation is signed by the parties. The filing of the petition should be clear notice in all cases that objectionable conduct is thereafter taboo" /Emphasis added./

441/ discharge Santiago and Toomer was largely inconsistent and contradictory. This gives rise to the conclusion that the alleged causes for their discharges were pretexts used by the Respondent to conceal its true motive: to punish them for their protected activities and to discourage such activities in the future. See, Daniel Construction Company, A Division of Daniel International, 229 NLRB 93, 95 (1977); Booth Broadcasting Co., 223 NLRB 867, 874-875 (1976). Respondent presented no evidence concerning its reasons for refusing to reinstate Sagardia following her leave of absence.

442/ The Respondent cites Section 10(b) of the Act, the 6-months statute of limitations applicable to the filing of complaints under the Act, to support its contention.

In view of the above and the failure of the Respondent's proffered legal precedents and reasoning to support its position or rebut the above, I will accept the General Counsel's recommendations and consider those unfair labor practices which occurred between April 13, 1977, the date of the filing of the petition in Case No. 22-RC-7119 and December 7, 1977, the date of the election, in determining whether the election should be set aside. 443/

Further, the Respoindent enterèd into an informal settlement agreement in Case Nos. 22-CA-7586 and 22-CA-7672 which was approved by the Acting Regional Director for Region 22 on July 12, 1977. On November 11, 1977, the Acting Regional Director issued an order withdrawing approval of and setting aside the informal settlement agreement due to the Respondent's extensive and repeated violations of its terms. The second amended complaint includes, and the parties have litigated herein, all of the alleged violations committed by the Respondent prior to its execution of the informal settlement agreement. Counsel for the Respondent raised objections to the General Counsel's prosecution of any of the alleged presettlement violations and also contended that the said informal settlement agreement was improperly set aside.

Section 101.9(e)(2) of the Board's Rules and Regulations, Series 8, as amended, provides that if a respondent fails to comply with the terms of an informal settlement agreement the Regional Director may set the agreement aside and institute further proceedings on the same charge. This codifies prior practice and case law. 444/

The evidence herein clearly shows that the Respondent failed to comply with the terms of the informal settlement agreement which was then properly set aside. In view of all of the above, the Respondent's presettlement conduct is properly litigable in the instant matter.

It is also clear from the record herein that the objections to employer conduct interfering with free choice in the election conducted on December 7, 1977, are coextensive with certain alleged unfair labor practices set forth in the consolidated second amended complaint. By virtue of the findings heretofore made, the subject of objections 1, 3, 4, 5, and 6, 445/in whole or in part, have

443/ See, Red's Novelty Co., 222 NLRB 899 (1976); Sindicato Puertorriqueno de Trabajadores, 184 NLRB 538 (1970).

444/ See, e.g., Wallace Corp. v. N.L.R.B., 323 U.S. 248, 15 LRRM 697 (1944); N.L.R.B. v. Southeastern Stages, Inc., 423 F.2d 878, 73 LRRM 2702 (C.A. 5, 1970); Larrance Tanks Corp., 94 NLRB 352, 353 (1951). The Board has consistently and recently followed this provision in its Rules and Regulations. See, e.g., Thermo Electric Co., Inc., 222 NLRB 358, 370 (1976), enf. 94 LRRM 2947 (C.A. 3, 1977); Jake Schlagel, Jr., d/b/a Aurora and East Denver Trash Disposal, 218 NLRB 1, 9 (1975). The Board's Rules and Regulations have the force of law. Wood, Wire and Metal Lathers International Union and its Local Union No. 2, AFL-CIO, 119 NLRB 1345, 1348-50 (1958).

445/ Objection 2 states, "During the week prior to the election, the employer circulated a book of benefits in which it promised benefits to employees to dissuade them from voting for the Union." There is no evidence in the (continued)

been substantiated as unfair labor practices within the meaning of Section 8(a)(1) and/or 8(a)(3) of the Act. Accordingly, these objections are sustained, and, based thereon, it shall be recommended that the election be set aside. 446/

V. The Effects of the Unfair Labor Practices upon Commerce

The activities of the Respondent set forth in Section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

VI. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As the unfair labor practices committed by the Respondent were so serious and go to the very heart of the Act, I shall recommend that it cease and desist therefrom and in any other manner from interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed to them in Section 7 of the Act. 447/

Having found that the Respondent did unlawfully fail and refuse to reinstate the employees listed in Appendix B until the dates respectively listed therein; unlawfully failed and refused to reinstate at all the employees listed in Appendix C; and, subsequently, unlawfully discharged its employees, Ruby Toomer, Carmen Sagardia and Jose Santiago, I recommend the following:

> That the Respondent offer Ruby Toomer, Carmen Sagardia and Jose Santiago and each and every employee listed in Appendix C, immediate and full reinstatement to their former positions, or if said positions no longer exist, to substantially equivalent positions, without loss of seniority or other benefits; and further, make Toomer, Sagardia and Jose Santiago, as well as each of the employees listed in Appendix B and Appendix C, whole for any loss of pay resulting from the discrimination against them by payment of a sum of money equal to the amount they normally would have earned as wages from the date of their discharge or the date they should properly have been reinstated,

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445/ record herein concerning such a "book of benefits" distributed to employees during the week prior to the election. Accordingly this objection is overruled.

446/ See Goodyear Tire and Rubber Company, 138 NLRB 453 (1966).

447/ Hickmott Foods, 242 NLRB No. 177 (1979); N.L.R.B. v. Express Publishing Company, 312 U.S. 426 (1941); N.L.R.B. v. Entwistle Mfg. Co., 120 F.2d 532 (C.A. 4, 1941).

respectively, to the date of a bona fide offer of reinstatement by the Respondent, or their actual reinstatement as the case may be, less any net interim earnings during these respective periods. The backpay due under the terms of the recommended Order shall include interest to be computed in the manner prescribed by the Board in F. W. Woolworth Company, 90 NLRB 289 (1950) and Florida Steel Corporation, 231 NLRB 651 (1977). 448/

The Applicability of a Bargaining Order

The second amended complaint alleges that, "The entry of a remedial order, without inquiring into the Union's majority status, is warranted requiring Respondent to recognize and bargain with the Union as the exclusive collective bargaining representative for the employees in the appropriate unit . . . as the unfair labor practices committed by the Respondent . . . are so outrageous and pervasive that their coercive effects cannot be eliminated by the application of traditional remedies, and as they have precluded the holding of a fair and reliable election." The General Counsel renewed this application in its brief.

The Respondent asserts that such an extraordinary remedy in the context of what occurred in this case is unwarranted for the reasons that Local 222 never secured signed authorization cards from a majority of employees in the bargaining unit at any time; that a bargaining order is an "essentially equitable remedy" and since Local 222 engaged in "violent acts of coercion," it is not entitled to such a remedy; and, that Local 222 lost the election held on December 7, 1977, indicating the employees real sentiment concerning the Union, "despite an established eligibility date which disenfranchised a majority of the employees in the unit." 449/

In N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575 (1969), the Supreme Court approved the Board's use of bargaining orders to remedy an employer's independent 8(a)(1) and (3) violations which fatally impeded the holding of a fair election in two situations. The first involves "exceptional" cases where the unfair labor practices are so "outrageous" and "pervasive" that "their coercive effect cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." The second covers "less extraordinary cases . . . which nonetheless still have the tendency to undermine majority strength and impede the election processes" but there must be "a showing that at one point the union had a majority." 500/

448/ See generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962). Also see, Olympic Medical Corporation, 250 NLRB No. 11 (1980); Pioneer Concrete Co., 241 NLRB No. 31 (1979).

449/ It should be noted that there is no evidence herein to support the Respondent's latter assertion regarding the alleged "/disenfranchisement/of a majority of the employees in the unit."

500/ N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575, 613-614 (1969); N.L.R.B. v. Logan Packing Co., 386 F.2d 562, 570 (C.A. 4, 1967); N.L.R.B. v. Heck's, Inc., 398 F.2d 237, 338. The Supreme Court in Gissel also indicated that the scope of the Board's remedial authority is broad (395 U.S. at 614).

The Board was presented with a Gissel first category case, clearly similar to the instant matter, in United Dairy Farmers Cooperative Association, 242 NLRB No. 179 (1979) and held that:

> In sum, upon careful consideration of the policies contained in the Act, the special responsibility of the Board to formulate remedies which further those policies, and the proper scope of the Board's remedial powers, we find that the Board's remedial authority under Section 10(c) of the Act may well encompass the authority to issue a bargaining order in the absence of a prior showing of majority support.

However, the Board, while recognizing that the employer's unfair labor practices in the United Dairy Farmers case were well within this first category delineated by the Supreme Court in the Gissel case ("outrageous" and "pervasive"), and for which, in accordance with Gissel, a bargaining order might well be an appropriate remedy, nevertheless declined to utilize such a remedy therein.

The rationale underlying the Board's refusal to issue a bargaining order lay in its balancing of "the policy in favor of enabling employees freely to exercise the right to choose whether or not they desire to be represented by the Union via an election against the damage to the election process caused by the employer's unfair labor practices." The Board, in the United Dairy Farmers case, continued:

> Where a majority of the employees have indicated their support for the union by cards and an employer's unfair labor practices have precluded the holding of a fair election, the Board has traditionally balanced those interests in favor of the issuance of a bargaining order as the remedy best suited to restoring the status quo ante consistent with the policies of the Act. 9/ Thus, a bargaining order not only eliminates the damage to the election process but, in addition, restores the prior expression of employee support for the union consistent with the principle of majority rule. . . . A different question arises, however, where the union has never obtained a showing of majority support and an employer's unfair labor practices have precluded the holding of a fair election. The imposition of a bargaining order in such cases does not restore the status quo--that is, an expression of majority support for the union--because there was no majority support and there is no assurance that a majority of employees would have supported the union had the employer refrained from engaging in unfair labor practices. A bargaining order in these circumstances presents a substantial risk of imposing a union on nonconsenting employees, and could only be justified if it served a substantial remedial interest. . . . However, on the facts in this case, we are persuaded that, in the absence of a prior showing by the Union of majority support at some point in the proceeding, it is less destructive of the Act's purposes to provide a secret-ballot election whereby the employees are enabled to exercise their choice for or against union representation, than it is to risk negating that choice altogether by imposing a bargaining

representative upon employees without some history of majority support for the Union. 11/

9/ See, e.g., Franks Bros. Co. v. N.L.R.B., 321 U.S. 702 (1944); N.L.R.B. v. Delight Bakery, Inc., 353 F.2d 344 (C.A. 6, 1965); American Map Company, Inc., 219 NLRB 1174 (1975); Beasly Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1, 228 NLRB 93 (1977).

11/ As experience dictates, we will continue to balance these competing interests. It may be that in some cases the facts will show that the atmosphere has become so poisoned as to preclude any reasonable likelihood of ever holding an election in which we can place any confidence, even if extraordinary remedies were employed.

However, the Board has not yet faced a case described in United Dairy Farmers, fn. 11. 501/

501/ The Board has consistently declined to issue a bargaining order in cases where, although the employer has committed massive "outrageous" and "pervasive" unfair labor practices, the Union never attained majority support of the employees at any time. See, Haddon House Food Products, Inc., 242 NLRB No. 180 (1979); Daniel Construction Company, 244 NLRB No. 106 (1977); Miami Springs Properties, Inc., 245 NLRB No. 22 (1979); Woonsocket Health Centre, 245 NLRB No. 80 (1979); Triana Industries, 245 NLRB No. 161 (1979); and Sambo's Restaurant, Inc., 247 NLRB No. 122 (1980). It should be noted that the General Counsel in its brief discusses extensively and in great depth the validity and number of the authorization cards obtained by the Union. In its decisions issued subsequent to the United Dairy Farmers case, the Board appears to have attached little or no significance to how close the union came to attaining a majority. The above cases in which the signed authorization cards were obtained included: Haddon House (27 of 56 unit employees), Daniel Construction (less than 30% of the employees signed cards), Miami Springs (46% of the unit employees supported the union), Woonsocket Health Centre (nearly 40% signed union authorization cards), Triana Industries (between 40-47% of the employees signed authorization cards), Sambo's (the union garnered less than 34% of the unit employees). In view of this, I merely make reference to the General Counsel's assertion that approximately 46 percent of the unit employees in the instant matter signed union authorization cards in support of the union, assuming arguendo that all these cards are valid. In this connection, the General Counsel proffered 136 authorization cards signed by the Respondent's unit employees in behalf of Local 222 and the testimony of 2 additional unit employees, who signed cards for the Union but whose cards had been misplaced by Local 222. Additionally, stated in the General Counsel's brief, the Excelsior list contained the names of 322 of the Respondent's employees, 22 of which are alleged by the General Counsel to be supervisors within the meaning of the Act, leaving an appropriate unit of 300 employees. The evidence supports this and I will therefore credit this allegation.

In view of all of the above, and even though the extensive unfair labor practices committed by the Respondent herein (numerous threats of plant closure, of discharge of employees and of loss of benefits; numerous promises of increased or new benefits; coercive interrogation of employees; numerous acts of soliciting employee grievances with promises to remedy the same; the grants of numerous benefits to employees; the discharges and the failures and refusals to reinstate a large number of its employees; creating the impression of surveillance, etc.) are so "outrageous" and "pervasive" as to tend to restrain its employees in the exercise of their Section 7 rights thus, rendering impossible a fair election, I will not recommend that the Respondent be ordered to recognize and upon demand bargain with Local 222 as the exclusive bargaining representative of the Respondent's employees in the appropriate unit herein.

Instead, recognizing that the nature and extensiveness of the Respondent's unfair labor practices committed herein make the conventional remedies already recommended herein insufficient to dissipate the effects of the Respondent's "outrageous" and "pervasive" acts and are inadequate to give the Respondent's employees "sufficiently explicit reassurances and understanding of their rights under the Act," 502/ I recommend that the Respondent be required to take the following affirmative steps in addition to the nonbargaining order remedies already recommended hereinbefore: 503/

(1) In addition to posting copies of the attached notice marked "Appendix A" in both Spanish and English, at its Edison, New Jersey facility, include it in the appropriate company publications, again in both Spanish and English, and mail it to each individual employee at his or her home address, including but not limited to all employees on the payroll at the time the unfair labor practices were committed; all such notices, both mailed and posted, to be signed personally by the Respondent's owner and president "Lee" Rizzuto, who shall also read the notice to current employees assembled for that purpose (the Respondent shall afford a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice);

(2) Publish in local newspapers of general circulation a copy of the above notice in both English and Spanish two times per week for a period of 4 weeks;

502/ See, United Dairy Farmers Cooperative Association, supra.

503/ As the Board stated in United Dairy Farmers at page 10:

> . . . we shall order additional remedial action designed to accomplish two objectives in the restoration of employee rights. First, such remedial action must, as directly and emphatically as possible, inform employees of their Section 7 rights and assure that Respondent will respect those rights. Secondly, the Union must be afforded an opportunity to participate in this restoration and reassurance of employee rights by engaging in further organizational efforts, if it so chooses, in an atmosphere free of further restraint and coercion.

(3) Upon request, grant the Union and its representatives reasonable access to its bulletin boards and all places where notices to employees are customarily posted;

(4) Upon request, grant the Union reasonable access to its plant in nonwork areas during employees' nonwork time;

(5) Supply the Union, upon request made within 1 year of the date of this Decision and Order, the names and addresses of its current employees;

(6) Give notice of, and equal time and facilities for the Union to respond to, any address made by the Respondent to its employees on the question of union representation; and

(7) Afford the Union the right to deliver a 30-minute speech to employees on working time prior to any Board election which may be scheduled in which the Union is a participant. Provisions (3), (4), (6), and (7) above, shall apply for a period of 2 years from the date of the posting of the notice provided by the Order herein, or until the Regional Director for Region 22 has issued an appropriate certification following a fair and free election, whichever comes first.

The Respondent, in its brief, asserts as a defense against the imposition of a bargaining order herein, the Union's misconduct during the course of the strike. 504/ While I have not recommended that a bargaining order be issued it would serve some purpose to discuss this defense.

The Board has consistently held that it will not order an employer to bargain with a union that disregards the peaceful legal processes afforded by the Act and instead resorts to violent tactics to achieve its aim. The Board's rationale for withholding an otherwise meritorious bargaining order was stated in Herbert Bernstein, Alan Bernstein, Laura Bernstein, d/b/a Laura Modes Company, 144 NLRB 1592, 1596 (1963):

> For we cannot in good conscience, disregard the fact that, immediately before and immediately after it filed the instant charges, the Union evidenced a total disinterest in enforcing its representation rights through the peaceful legal processes provided by the Act in that it resorted to and/or encouraged the use of violent tactics to compel their grant. Our powers to effectuate the statutory policy need not, we think, be exercised so single-mindedly in aiming for remedial

504/ As discussed hereinbefore, the Respondent raised Local 222's misconduct during the strike as a defense to its obligation herein to reinstate striking employees. It should also be noted at this time that the Respondent's other defenses and assertions herein concerning the alleged failure of proof as to the issues involved in this proceeding on the General Counsel's part and the implied impropriety of the General Counsel's position herein because of knowledge of Local 222's misconduct during the strike are clearly without merit, and I so find.

> restoration of the status quo ante, that we must disregard or sanction thereby union enforcement of an employer's mandatory bargaining duty by unprovoked and irresponsible physical assaults of the nature involved here. We recognize of course that the employes' right to choose the Union as their representative survives the Union's misconduct. But we believe it will not prejudice the employees unduly to ask that they demonstrate their desires anew in an atmosphere free of any possible trace of coercion. /505/

Subsequent cases reveal a Board policy that a bargaining order will be withheld where the union has engaged in a deliberate plan of intimidation and violence in order to assure the employees' adherence to the union. 506/

In Maywood Plant of Grede Plastics, A Division of Grede Foundries, Inc., 235 NLRB 363 (1978), the Board considered the limits of union misconduct which might preclude the issuance of a bargaining order in accordance with the Laura Modes Company case. 507/ While the Board in this case found that the Union's various acts of misconduct during the strike were "serious violations," it did not consider them to rise to the level which would preclude the issuance of an otherwise meritorious bargaining order. 508/ Key to the Board's reasoning was the premise that "but for the Company's antecedent unfair labor practices the Union would not have engaged in its strike to protest the Company's unlawful act and thus would not have been in a position to commit the violations of the Act which accompanied the strike." 509/ In arriving at its determination, the Board considered a number of factors:

1. Extent of the union's interest in pursuing legal remedies;

2. The deliberateness of the union's conduct during the strike;

3. Whether the union's conduct was provoked by the company's own unlawful conduct;

505/ Cf., Martin Arsham Sewing Co., 244 NLRB No. 149 (1979).

506/ Allou Distributors, Inc., 201 NLRB 47 (1973); Union Nacional de Trabajadores (The Carborundum Company of Puerto Rico), 219 NLRB 863, 863-864 (1975), enfd. 540 F.2d 1 (C.A. 1, 1976), cert. denied 429 U.S. 1039 (1977); Independent Association of Steel Fabricators, Inc., 231 NLRB 264, 287-288 (1977).

507/ 144 NLRB 1592 (1963).

508/ The Union's misconduct, committed during the 6 weeks of a 5-month long unfair labor practice strike, included: mass picketing, obstructing ingress and egress to the plant in a physically harassing manner; threatening supervisors and employees in the presence of other employees; damaging employees' and company property; and various acts of minor assault against employees.

509/ Maywood Plant of Grede Plastics, A Division of Grede Foundries, Inc., supra, at page 364.

4. The length of the union's misconduct in comparison to the duration of the strike and the company's pre-strike illegality;

5. The relative gravity of the union's misconduct as opposed to that of the company. /510/ /

In N.L.R.B. v. United Mineral & Chemical Corporation, 391 F.2d 829, 840 (C.A. 2, 1968), the Court of Appeals for the Second Circuit stated that in determining whether a bargaining order is warranted, "The Board must balance the severity of the employer's unfair labor practices which provoked the industrial distrubances against whatever employee misconduct may have occurred in the course of the strike." 511/

The Board in Daniel A. Donovan, Charles Brennick Co-Partners doing business under the trade name and style of Daniel A. Donovan d/b/a New Fairview Hall Convalescent Homes, 206 NLRB 6888 (1973), enf. 520 F.2d 1316 (C.A. 2, 1975), cert. denied 423 U.S. 1053 (1976), stated at page 689 as follows:

> We do not condone any picket line violence, and the processes of this Board are available to prevent its recurrence, as is evidence by the 8(b) proceeding herein. But we also are reluctant to deprive a substantial group of employees of the benefits of collective bargaining because of the misconduct of a few miscreants. Here, looked at in perspective, there were but few instances of misconduct by a relatively small proportion of strikers, which occurred only sporadically in the context of a 4-month long strike and against a background of Respondent's frequent and recurring unfair labor practices. Viewed in that light, while recognizing that the matter is not altogether free from doubt, we have concluded that the extraordinary sanction of withholding an otherwise appropriate remedial bargaining order woujld nto best effectuate the policies of the Act.
>
> As to the propriety of a remedial bargaining order, we find that Respondent's pervasive unlawful conduct tended to undermine and destroy the Union's majority support and was of such a severe nature as to make a fair election doubtful, if not impossible. In these circumstances, to deny the employees the rights normally attendant upon the designation of a bargaining agent by a majority of their number, knowing that a prompt and fair means of freely determining majority status has been effectively forclosed by Respondent's unlawful acts, would leave this work force without any effective means of exercising its rights under our Act and would reward Respondent for its own wrongdoing. Therefore, we shall order Respondent to bargain collectively, upon request, with the Union as the exclusive

510/ Maywood Plant of Grede Plastics, supra, at page 365-366.

511/ See also, World Carpets of New York, Inc., 188 NLRB 122 (1971), enf. denied in relevant part 463 F.2d 57 (C.A. 2, 1972); Ramona's Mexican Foods, 203 NLRB 663, 685 (1973), enfd. 531 F.2d 390 (C.A. 9, 1975); Cascade Corporation, 192 NLRB 533, 536 (1971), remanded 81 LRRM 2123 (C.A. 6, 1972).

representative of the ekmployees in the unit described below, which we find to be appropriate. /512/

The unfair labor practice strike in the instant case lasted 166 days, from April 11, 1977 through September 23, 1977. At the hearing counsel for the Respondent, Herbert Burstein, described the conduct on the picket line as follows:

> . . . on April 11, 1977 having concluded that their efforts were not productive, they /Local 222/ engaged in a course of conduct which would make the Molly Maguires look like /May/ Dancers.

The Respondent alleges that incidents of misconduct by the Union contrived throughout the strike. The General Counsel and the Charging Party, while admitting that some violence did take place, assert that such misconduct was confined to the first 2 or 3 days of the strike and that any isolated instances occurring thereafter were not attributable to the Union except for what occurred on July 21, 1977 during the Wahler incident. Moreover, they assert that this incident was deliberately planned and provoked by the Respondent itself. They also contend that after the first 2 days of the strike the picketing was orderly and without incident of misconduct.

That misconduct occurred during the first 2 days of the strike, April 11 and 12, 1977, is clearly supported by the evidence in the record. 513/ That this misconduct involved rock and bottle throwing, tire slashing, name calling, threats against employees, minor injuries to employees, damage to

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512/ Circumstances in which the Board has declined to withhold a bargaining order include situations where isolated instances of misconduct occurred in the heat of picket line tensions which did not appear to be part of a plan of intimidation, as was the case in Laura Modes Company. (Quintree Distributors, Inc., 198 NLRB 390, 404-405 (1972)); where the alleged misconduct involved only a handful of striking employees and was confined to the early weeks of the strike (Daniel A. Donovan, et al., d/b/a New Fairview Hall Convalescent Home, supra); threats of bodily harm (but no assaults), namecalling harassment, and tire slashing. Also see, (Philadelphia Ambulance Service, Inc., 238 NLRB No. 152, slip op. at p. 3, fn. 6 (1978).)

513/ Aside from the credible testimony of numerous witnesses concerning union misconduct during the first 2 days of the strike, there are also photographs in evidence showing damage to employee automobiles inflicted by the union pickets. Significantly, John Mayorek testified that Jerry Rivera, a union official, told him on the morning of April 11, 1977 when the strike commenced that the Union had "lost control" of the picketers. While I generally did not credit Mayorek's testimony, certain parts thereof are believable and corroborated by other uncontradicted evidence in the record. Further, Rivera did not specifically deny making the above statement.

employees' automobiles, and some damage to plant property is also evidence from the record. 514/

However, there is also ample evidence in the record, supported by testimony from various of the Respondent's own witnesses, that after the first 2 or 3 days of the strike (and a few incidents which occurred during the week of July 18, 1977), the strike was generally conducted in a peaceful manner with no significant picket line misconduct. 515/

Using the criteria established by the Board in Maywood Plant of Grede Plastics et al., supra, it is clear that had a bargaining order been otherwise warranted in the instant case, the Union's misconduct herein, unlike the situation in Laura Modes Company, supra, would not have precluded the imposition of such an order. 516/

514/ There is also evidence that the Respondent suffered a series of fires in and around its plant as well as a night-time shot-gunning of its executive offices. Although the Union denied responsibility for such incidents and the Respondent could offer no proof to show Union complicity therein, it is still very suspicious that these incidents occurred only after the strike commenced and nothing like this had ever happened before. However, it should also be noted that Teamsters Local 102 was also engaged in union organizing activities at this time on what seems to be a substantially smaller scale than Local 222's activities.

515/ The video tapes of picket line conduct during the course of the strike confirm this as does the testimony of Jerry Kampel and John Mayorek. Additional evidence is found in the Respondent's April 20, 1977 mailgrams to all its employees who failed to return to work after April 11, 1977; the mailgram informed them that there was "no violence, employees freely enter the plant."

516/ The record herein evidences that the Union pursued its legal remedies before the Board by repeatedly filing charges with and allegedly supplying evidence to the Board's Regional Office, Region 22. Further, Local 222 voluntarily remedied the unfair labor practices it committed by entering into and complying with a formal settlement stipulation providing for a Board order and court enforcement (Case Nos. 22-CB-3540 and 22-CB-3603).

The evidence herein shows that the acts of violence and intimidation were not deliberately planned by the Union but in fact were the spontaneous products of a highly disorganized picket line. Moreover, other than the aforementioned incidents on the evening of July 21, 1977, there is no credible evidence that any agent of Local 222 engaged in any acts of misconduct.

It is inescapable that the Respondent, by its conduct both before and during the strike, "established a volatile situation through uncompromising and unlawful efforts to destroy the union." Further, there is some evidence herein which can be construed to show that the incidents involving John Bourbakis, Anthony Schirripa and Francis Wahler were intentionally provoked; the Wahler incident involved nonemployees.

Aside from what was previously said about the Respondent's prestrike unlawful conduct, it should be noted that the strike lasted approximately 5-1/2 months and the Union's misconduct was mainly confined to the first 2 or

(continued)

Reimbursement of Litigation Expenses and Union Organizational Costs

Additionally, both the General Counsel and counsel for the Charging Party moved for reimbursement from the Respondent for "all expenses incurred in the investigation, preparation and presentation of the case including reasonable counsel fees, witness fees, transcript and record costs, travel expenses and other costs and expenses." Both these parties contend that the Respondent's defenses to the unlawful conduct alleged in the second amended complaint were entirely "frivolous" and "non-existent." The Charging Party also moved at the hearing for reimbursement for its "organizational expenses incurred by virtue of Respondent's bad faith in unfair labor practices." The Respondent opposes these motions and contends that "even if an employer's conduct is ultimately found to constitute flagrant, aggravated and pervasive unfair labor practices, its defenses are not necessarily frivolous." 517/

The Board in Tiidee Products, Inc., 194 NLRB 1234 (1972) held that where a Respondent engaged in frivolous litigation that is clearly unwarranted and meritless on its face, it should be compelled to reimburse the Board and the Charging Party for all expenses incurred in the investigation, preparation and presentation of the case. 518/ The Board seeks to discourage frivolous litigation and to "prevent the employer from having a free ride during the period of litigation." 519/ This remedy has also been imposed where the employer

516/ 3 days of the strike. This "balance" would not be overly changed even if, arguendo, the additional incidents of misconduct alleged by the Respondent were found to be true.

The evidence clearly shows that Local 222's misconduct, when viewed as to relative gravity in the light of the Respondent's "outrageous" and "pervasive' unfair labor practices committed herein, "is sufficient to justify the extraordinary action . . . in withholding the appropriate bargaining order required to remedy the Company's unfair labor practices."

Additionally, in Jimmy Dean Meat Company, Inc. of Texas, 227 NLRB 1012, 1040 (1977), the union's misconduct which the employer asserted as a Laura Modes Company defense was found to be insufficient to withhold a bargaining order where the nature and the extent of the misconduct though serious, did not establish that the union was seeking to enforce its right to represent the employees through violent tactics. The Board found therein that the misconduct of the union was sufficiently remedied by an informal settlement agreement of the unfair labor practice charges filed against the union as the result of such misconduct. (Though in Laura Modes Company, a prior settlement was determined to have no bearing on the withholding of the bargaining order.)

517/ Television Wisconsin, Inc., 224 NLRB 722 (1976); Federal Prescription Service, Inc. v. NLRB, 496 F.2d 813, 819 (C.A. 8, 1974), cert. den. 419 U.S. 1049 (1975); Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1045 (C.A. 8, 1976).

518/ These include reasonable counsel fees, witness fees, transcript and record costs, travel expenses and other costs and expenses.

519/ International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB v. Tiidee Products, Inc., 426 F.2d 1243, 1251 (C.A.D.C. 1970).

follows a pattern of unlawfully resisting union organizing or engages in "flagrant repetition of conduct previously found unlawful" and to that end unduly burden the processes of the Board and the Courts. 520/

However in examining the propriety of awarding litigation and organizational expenses against a Respondent, the Board has distinguished between "patently frivolous" defenses 521/ to unfair labor practice charges and defenses which are "debatable." In the latter situation the Board has held that reimbursement of litigaiton and organizational expenses is inappropriate, even when the unfair labor practices are flagrant and repetitious. 522/ Also the Board has consistently followed its rule that litigation and organizational expenses are not to be awarded against a respondent unless the defenses raised are patently frivolous. 523/ An additional prerequisite to the awarding of organizational costs was set forth in Winn-Dixie Store, Inc., 224 NLRB 1418 (1976). The Board held that it will not award organizational costs to a union unless the union proves that the employer's unfair labor practices were causally related to any extraordinary organizational expenses incurred by the union.

In view of the above, and the record herein as a whole, I do not find that the Respondent's defenses were so "patently frivolous" to warrant the imposition of litigation and organizational expenses and therefore deny the motions by the General Counsel and the Charging Party seeking such an extraordinary remedy.

Conclusions of Law

1. The Respondent, Conair Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local 222, International Ladies' Garment Workers' Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By soliciting employee grievances and complaints and indicating that such grievances and complaints would be adjusted; by expressly and impliedly promising benefits to its employees; by threatening and warning employees that existing benefits would be taken away or reduced; by coercively interrogating employees concerning their union activities and sympathies; by threatening employees with plant closure and loss of employment; by creating the impression that the employees' activities on behalf of the Union were under surveillance;

520/ Food Store Employees Union, Local No. 347 Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. NLRB, 476 F.2d 546, 551 (C.A.D.C. 1973).

521/ Tiidee Products, Inc., supra.

522/ Heck's, Inc., 215 NLRB 765 (1974); Metco, Inc., 205 NLRB 875, (1973), enf. 496 F.2d 1342 (C.A. 5, 1974); Lang Towing, Inc., 201 NLRB 629 (1973).

523/ Betra Manufacturing Co., 233 NLRB 1126 (1977); Schuck Component Systems, 230 NLRB 838 (1977); Hartz Mountain Corporation, 228 NLRB 492 (1977); Winn-Dixie Stores, Inc., 224 NLRB 1418 (1976); Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (C.A. 8, 1976). In Sabine Towing & Transportation Co., 224 NLRB 941 (1976), this rule was followed even though the employer had committed similar unfair labor practices in the past.

and by promising and granting employees improved or additional benefits, all for the purpose of inducing its employees to cease giving support to the Union or to any other labor organization, the Respondent has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By failing and refusing to timely reinstate the employees listed in Appendix "B"; by failing and refusing to reinstate at all, the unfair labor pratice strikers listed in Appendix "C"; and by discharging and failing and refusing to reinstate Ruby Toomer, Carmen Sagardia, and Jose Santiago, all because they had engaged in union or other protected concerted activity, with intent to discourage unit employees from engaging in union or other protected activities, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

5. All production and maintenance employees, including shipping and receiving employees, warehouse employees, truck drivers and janitorial maintenance employees employed by the Respondent at its Edison plant, but excluding all office clerical employees, plant clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. By the findings heretofore made with respect to objections in Case No. 22-RC-7119, the Respondent-Employer engaged in pre-election misconduct interfering with the election conducted on December 7, 1977.

7. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 524/

ORDER

The Respondent, Conair Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees concerning their union activities and sympathies.

524/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Threatening and warning its employees with loss of existing benefits or a reduction thereof if they continue to support or assist the Union or any other labor organization.

(c) Soliciting employee grievances and promising that such grievances will be adjusted for the purpose of influencing their selection of a labor organization as their bargaining representative.

(d) Expressly or impliedly promising benefits to its employees to discourage assistance or support of the Union or any other labor organization.

(e) Threatening employees with plant closure and loss of employment if they continue to support or assist the Union or any other labor organization.

(f) Engaging in surveillance of union activity or creating the impression that such activity is subject to surveillance.

(g) Granting employees improved or additional new benefits for the purpose of influencing their selection of a labor organization as their bargaining representative.

(h) Discouraging membership in a labor organization by discharging, refusing to reinstate in timely fashion or to reinstate at all, or otherwise discriminating against employees in their hire and tenure.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act. 525/

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the unfair labor practice strikers listed in Appendix "C", and Ruby Toomer, Carmen Sagardia and Jose Santiago, immediate and full reinstatement to their former positions, or if these positions are no longer available, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make the employees listed in Appendix "B", the unfair labor practice strikers in Appendix "C", and the discharged employees Ruby Toomer, Carmen Sagardia and Jose Santiago whole for any loss of pay which they may have suffered by reason of the discrimination against them, in accordance with the recommendations set forth in the section of this decision entitled "The Remedy."

525/ A broad order is warranted herein as indicated by the serious unfair labor practices found. O & H Rest, Inc., Trading as the Backstage Restaurant, supra; The Stride Rite Corporation, supra; Ann Lee Sportswear, Inc., 220 NLRB 982 (1975).

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Mail a copy of the attached notice marked Appendix "A" 526/ to each and every employee at his or her home address, post copies thereof at its plant in Edison, New Jersey, and include a copy in appropriate company publications. 527/ Copies of said notice, on forms provided by the Regional Director for Region 22, shall be personally signed by the Respondent's president and owner "Lee" Rizzuto. Copies of said notice shall be mailed by the Respondent to each and every employee working at its plant on the date on which such notice is mailed, as well as each and every employee who worked in its plant during the period of the Respondent's unfair labor practices, and additional copies shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Publish in local newspapers of general circulation copies of the attached notice marked Appendix "A". Such notice shall be published twice weekly for a period of 4 weeks. 528/

(f) Convene during working time all employees at its Edison, New Jersey plant, either in shifts or departments, or otherwise, and have the Respondent's president and owner, "Lee" Rizzuto, read to the assembled employees the contents of the attached notice marked Appendix "A". 529/ The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notices.

(g) Upon request of the Union made within 1 year of the issuance of the Order herein, without delay make available to the Union a list of names and addresses of all employees employed at the time of the request.

526/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

527/ This notice shall be prepared in both English and Spanish, and where required to be mailed, posted or published be done so in both languages.

528/ This notice shall be published in both English and Spanish.

529/ The reading of this notice by Rizzuto if performed in English shall be translated into Spanish and read in that language to the employees by a Spanish interpreter or person fluent in the Spanish language.

(h) Immediately upon request of the Union, for a period of 2 years from the date on which the aforesaid notice is posted, grant the Union and its representatives reasonable access to the plant bulletin boards and all places where notices to employees are customarily posted.

(i) Immediately upon request of the Union, for a period of 2 years from the date on which the aforesaid notice is posted, permit a reasonable number of union representatives access for reasonable periods of time to nonwork areas, including but not limited to canteens, cafeterias, rest areas, and parking lots, within its Edison, New Jersey plant, so that the Union may present its views on unionization to the employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other nonwork periods.

(j) In the event that during a period of 2 years following the date on which the aforesaid notice is posted, any supervisor or agent of the Respondent convenes any group of employees at the Respondent's Edison, New Jersey plant and addresses them on the question of union representation, give the Union reasonable notice thereof and afford two union representatives a reasonable opportunity to be present at such speech, and, upon request, give one of them equal time and facilities to address the employees on the question of union representation.

(k) In any election which the Board may schedule at the Respondent's Edison, New Jersey plant within a period of 2 years following the date on which the aforesaid notice is posted, and in which the Union is a participant, permit, upon request by the Union, at least two union representatives reasonable access to the plant and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be not more than 10 working days, but not less than 48 hours, prior to any such election. 530/

(l) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the election held on December 7, 1977, in Case No. 22-RC-7119 be, and it hereby is, set aside.

Dated: JUL 30 1980

Jesse Kleiman

JESSE KLEIMAN
Administrative Law Judge

530/ Subpars. (i), (j),(k), and (l) herein shall be applicable only so long as the Regional Director has not issued an appropriate certification following a fair and free election.

APPENDIX "A"

FORM NLRB-4727
(9-69)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a trial in which all the parties participated, the National Labor Relations Board has found that we have violated the National Labor Relations Act. We have been ordered to post this notice and to abide by its terms.

The National Labor Relations Act gives all employees these rights:

To engage in self-organization
To form, join, or help unions
To bargain collectively through a representative of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all these things.

WE WILL NOT do anything that interferes with, restrains or coerces employees with respect to these rights. More specifically,

WE WILL NOT discharge or in any other manner discriminate against employees because of their union activities.

WE WILL NOT threaten or warn employees with discharge, loss of benefits or other reprisals because of their union activities, membership or support.

WE WILL NOT threaten to close the plant in order to prevent union activities among our employees.

WE WILL NOT fail or refuse to either reinstate striking employees upon their unconditional application to return to work or fail to do so in a timely fashion.

WE WILL NOT discourage membership or activities on behalf of Local 222, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization by discharging employees or discriminating against them in their hire or tenure.

WE WILL NOT coercively interrogate employees concerning their union membership, activities or support.

WE WILL NOT solicit employee grievances and promise that such grievances will be adjusted.

WE WILL NOT promise or grant improved or additional new economic benefits or other terms or conditions of employment if they abandon their support of a union.

WE WILL NOT create among our employees the impression that their union activities are under surveillance.

WE WILL NOT threaten to never negotiate with a union should it lawfully represent our employees in order to discourage union membership, activities or support.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Ruby Toomer, Carmen Sagardia, Jose Santiago and all the unfair labor practice strikers listed in Appendix "C" immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions.

WE WILL pay Ruby Toomer, Carmen Sagardia, Jose Santiago and all the employees and unfair labor practice strikers listed respectively in Appendices "B" and "C" for any earnings they lost as a result of our discrimination against them, plus interest.

WE WILL send to all our employees copies of this notice; WE WILL read this notice to all our employees; and WE WILL publish copies of this notice in local newspapers.

WE WILL, upon request of the Union made within 1 year of issuance of the Board's Decision and Order, make available to the Union a list of names and addresses of all our employees currently employed.

WE WILL, immediately upon request of the Union, grant the Union and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted.

WE WILL, immediately upon request of the Union, grant the Union and its representatives reasonable access to our plant in nonwork areas during employees' nonworktime in order that the Union may present its views on unionization to employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes or other nonwork periods.

WE WILL, if we gather together any group of our employees on worktime at our plant and speak to them on the question of union representation, give the Union reasonable notice and give two union representatives a reasonable opportunity to be present at such speech and, on request, give one of them equal time and facilities also to speak to you on the question of union representation.

WE WILL, in any election which the Board may schedule at our plant and in which the Union is a participant, permit, upon request by the Union, at least two union representatives reasonable access to the plant and appropriate facilities to speak to you for 30 minutes on working time, not more than 10 working days, but not less than 48 hours, prior to the election.

WE WILL apply the four paragraphs immediately preceding this one for a period of 2 years from the date of posting of this notice, or until the Regional Director of the National Labor Relations Board certifies the results of a fair and free election, whichever comes first.

Our employees have the right to join Local 222, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization or to refrain from doing so.

CONAIR CORPORATION
(Employer)

Dated_____ By_____
(Lee Rizzuto) (President)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office,

Federal Building, Room 1600, 970 Broad Street,
Newark, New Jersey 07102 Tel. No. (201) 645-3652

APPENDIX "B" JD-(SF)-83-80

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Lucille Allen	October 4, 1977
Maria Arocho	October 4, 1977
Rosita Cruz	October 4, 1977
Christina De Armas	October 4, 1977
Florence L. Heimbuch	October 4, 1977
Carmen Irizzarry	October 4, 1977
Florence F. Jacko	October 4, 1977
Beulah Jones	October 4, 1977
Flora F. Kurtanick	October 4, 1977
Dorothy Lodato	October 4, 1977
Victor Maisonet	October 4, 1977
Irene Martinez	October 4, 1977
Laura Martinez	October 4, 1977
Miliady Mendez	October 4, 1977
Milagros Muniz	October 4, 1977
Louis B. Ortiz	October 4, 1977
Yillian T. Perez	October 4, 1977
Olga Rios	October 4, 1977
Ana Santiago	October 4, 1977
Carmen M. Sagardia	October 4, 1977
Rosaura Soto	October 4, 1977
Ishmael Torres	October 4, 1977
Verta May Allen	October 11, 1977
Hector Caraballo	October 11, 1977
Hilda Della Torre	October 11, 1977
Margarita Gautier	October 11, 1977
Carmen Lopez	October 11, 1977
Luz M. Melendez	October 11, 1977
Hilda Perez	October 11, 1977
Alicia Rivera	October 11, 1977
Jose R. Rivera	October 11, 1977
Genovena Arocho	October 12, 1977
Olga Chalfa	October 12, 1973
Patricia Eaford	October 12, 1973
Rosaria Machin	October 12, 1973
Rosalia Mendez	October 12, 1973
Jose Negron	October 12, 1973
Antonio Neiro	October 12, 1973
Julia Pellallera	October 12, 1973
Lilia Quiles	October 12, 1973
Awilda Rodriguez	October 12, 1973
Jose Santiago	October 12, 1973
Aida Iris Torres	October 12, 1973
Alberto Vargas	October 12, 1977
Elsie Vega	October 12, 1977

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Adamina Nieves	October 14, 1977
Virginia Rivera	October 14, 1977
Rufino Saez	October 14, 1977
Portinia Soto	October 14, 1977
Rafael Valdes	October 14, 1977
Mayes Garcia	October 18, 1977
Gloria Guzman	October 18, 1977
Juan Hernandez	October 18, 1977
Roberto Mercado	October 18, 1977
Elizabeth Muniz	October 18, 1977
Wadilia Santiago	October 18, 1977
Sonia Torres	October 18, 1977
Felix Vasquez	October 18, 1977
Miguel Aquino	October 19, 1977
Celia Cruz	October 19, 1977
Celia Febles	October 19, 1977
Wilfredo Guerrero	October 19, 1977
Alice Jones	October 19, 1977
Noraima Mendez	October 19, 1977
Martha Parada	October 19, 1977
Jose Vazquez	October 19, 1977
Wilfredo Vazquez	October 19, 1977
Etta Burns	October 24, 1977
Hiriam Guzman	October 24, 1977
Carmen Sanson	October 24, 1977
Alida Pabon	October 25, 1977
Michael Billings	November 2, 1977
Dominga Cruz	November 2, 1977
Martha Davison	November 2, 1977
Evelyn Lee	November 2, 1977
Annette Palmer	November 2, 1977
Denise Perrotte	November 2, 1977
David Letendre	November 7, 1977
Richard Letendre	November 7, 1977
Raymond Crespo	November 7, 1977
Ana Rosa Fernandez	November 7, 1977

FILED
MAY 23 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1520

In the Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
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Department of Justice
Washington, D.C. 20530
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WILFORD W. JOHANSEN
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National Labor Relations Board
Washington, D.C. 20570

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Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

§ 8(a)(1), 29 U.S.C. 158(a)(1) 1

§ 8(a)(3), 29 U.S.C. 158(a)(3) 1

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. Based on its findings that respondent Conair Corporation's extensive unfair labor practices[1] undermined nascent union support and foreclosed any possibility of holding a fair representation election, and that "a remedial

[1]The Board, in agreement with the administrative law judge, found that Conair engaged in conduct violative of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), including threats of loss of existing benefits and of plant closure, promises and grants of additional benefits, and coercive interrogation. Pet. App. 116a-117a, 119a-124a. Also in agreement with the administrative law judge, the Board found that Conair violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by failing immediately to reinstate 81 unfair labor practice strikers upon their unconditional offer to return to work, by refusing to reinstate 13 other unfair labor practice strikers, and by discriminatorily discharging 3 strikers following their reinstatement. 261 N.L.R.B. 1189, 1279-1282. Additionally, the Board (Chairman Van de Water and Member Hunter dissenting) found that Conair violated Section 8(a)(3) and (1) of the Act by discharging all the unfair labor practice strikers while the strike was in progress. Pet. App. 114a-116a.

bargaining order is the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization" (Pet. App. 125a), the Board (then-Chairman Van de Water and Member Hunter dissenting) issued a bargaining order despite the absence of tangible evidence that the Union had ever achieved majority status.[2] The Board found that "this case is the 'exceptional' type envisioned in *Gissel* which warrants the [issuance] of a remedial bargaining order 'without need of inquiry into majority status on the basis of cards or otherwise' " (Pet. App. 124a).[3]

2. The court of appeals upheld the Board's unfair labor practice findings except for the finding that Conair had unlawfully discharged all the strikers during the strike (Pet.

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[2]The Board noted, however, that there was a reasonable basis for concluding that the Union would have enjoyed majority status but for Conair's unlawful actions because 46% of the employees signed authorization cards in a short period of time before the unfair labor practices took their toll (Pet. App. 128a).

[3]In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Court, reversing the Fourth Circuit in three cases, sustained the Board's authority to require an employer to recognize and bargain with a union that based its claim to representative status on authorization cards where (1) the employer had engaged in unfair labor practices that tended to preclude the holding of a fair election, (2) "there is also a showing that at one point the union had a majority," and (3) the Board "finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Id.* at 614-615. While all of the cases resolved in *Gissel* involved card-based claims of majority status, the Court noted that the Fourth Circuit itself (see *NLRB* v. *Logan Packing Co.*, 386 F.2d 562, 570 (1967)) had "left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices" (395 U.S. at 613).

App. 20a-32a). The court also accepted the Board's "expert appraisal" (*id.* at 36a) that Conair's unfair labor practices were "so 'outrageous' and 'pervasive as to . . . render[] impossible a fair election' " (*id.* at 33a). But a majority of the court held that the Board lacks statutory authority to issue a non-majority bargaining order (*id.* at 41a-59a). The court concluded that neither the text of the Act nor its legislative history "suggests that Congress contemplated general authority in the Board to select or designate a union for employees, a majority of whom never signaled assent to the arrangement" (*id.* at 45a). Nor, in the court's view, did this Court's decision in *Gissel* require a contrary conclusion. Since the cases covered by that decision all involved situations in which the union had majority support at one time, the court of appeals concluded that *Gissel* left open the issue of Board authority to issue non-majority bargaining orders (Pet. App. 50a). Finally, the court concluded that non-majority bargaining orders were contrary to the Act's twin policies of freedom of choice and majority rule in employee selection of bargaining representatives (*id.* at 51a-55a).[4]

Judge Wald dissented. She found nothing in the language of the Act, its legislative history, or its policies that would limit the Board's authority to issue non-majority bargaining orders (Pet. App. 77a-95a).

3. On May 14, 1984, the Board issued its decision in *Gourmet Foods, Inc.*, 270 N.L.R.B. No. 113, in which it overruled "those cases in which the Board has found that it has statutory remedial authority to issue nonmajority bargaining orders and in which the Board has exercised that

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[4]In all other respects, save one, the court enforced the remainder of the Board's order, including extraordinary notice and access remedies (Pet. App. 40a-41a, 58a-59a, 98a-102a). The exception related to an issue as to which the court found that Conair had not received timely notice of the question to be litigated (*id.* at 23a-24a).

authority" (*id.* at 16-17 (footnote omitted)).[5] Chairman Dotson and Member Hunter concluded that the "majority rule principle is such an integral part of the Act's current substance and procedure" that it imposes "a direct limitation on the Board's existing statutory remedial authority" (*id.* at 16) and expresses a policy that "would compel us to decline to issue a nonmajority bargaining order even if we had the authority to do so" (*id.* at 24). Member Dennis, who concurred, agreed, for the reasons expressed in the majority opinion of the court below in this case (Pet. App. 41a-57a), that "imposition of nonmajority bargaining orders is inconsistent with the Act's bedrock principles of employee free choice and majority rule" (270 N.L.R.B. No. 113, at 29 (footnote omitted)).[6]

4. Petitioner, the charging party before the Board, seeks review of the decision of the court below that the Board lacks statutory authority to issue a non-majority bargaining order as a remedy for the kind of "outrageous" and "pervasive" unfair labor practices that occurred here, contending that it is inconsistent with this Court's decision in *Gissel* and in conflict with the decision of the Third Circuit in *United Dairy Farmers Cooperative Ass'n* v. *NLRB*, 633 F.2d 1054 (1980).

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[5]Copies of the Board's decision in *Gourmet Foods* have been lodged with the Clerk and served on the parties to this proceeding.

[6]Member Dennis added that, even if "the Board had the statutory authority to issue a nonmajority bargaining order," she would decline to issue one in *Gourmet Foods* because, on the facts of that case, she did not believe that "such an order would best effectuate the policies of the Act" (270 N.L.R.B. No. 113, at 29 n.4).

Member Zimmerman dissented from the Board's holding that it lacks authority to issue non-majority bargaining orders. 270 N.L.R.B. No. 113, at 32-47.

a. It is true that the decision of the court of appeals here conflicts with the holding of the Third Circuit that the Board possesses authority to issue non-majority bargaining orders. Nevertheless, resolution of that conflict is not warranted at this time. As indicated, it is the position of two members of the current four-member Board that, even if the Board were empowered to issue non-majority bargaining orders, it should refrain from exercising that authority as a matter of policy. No court of appeals, including the Third Circuit, has as yet had occasion to decide whether the Board is required to issue such orders even if, as a matter of policy, it would prefer to refrain from doing so. Should the courts of appeals uphold the position that, even if the Board has power to issue non-majority bargaining orders, it may properly refuse to do so as a matter of remedial discretion, the conflict among the circuits over the Board's statutory authority to issue such orders would become academic. Moreover, since the Board in *Gourmet Foods* has adopted the view of the court below that the Board lacks statutory authority to issue non-majority bargaining orders, review of the statutory authority question, should it ever become necessary, would be more appropriate in a case that reflects the current position of the Board.

b. Contrary to petitioner's contention (Pet. 10-14), the decision of the court of appeals here is not inconsistent with this Court's decision in *Gissel*. As the court of appeals correctly pointed out (Pet. App. 46a n.82), all four of the cases consolidated for decision in *Gissel* involved situations in which unions had obtained majority support based on authorization cards. As the court of appeals further pointed out (Pet. App. 46a-48a), the Court's observation concerning so-called Category I cases (those " 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices" in which a bargaining order might be imposed without an inquiry into majority status (395 U.S. at 613)) merely

noted dictum of the Fourth Circuit suggesting that a bargaining order might be appropriate in such circumstances. Moreover, the Board cases referred to by the Court in *Gissel* (395 U.S. at 614) in its discussion of Category I cases all involved situations in which, although there was no finding of an unlawful refusal to bargain or a bargaining demand, the unions involved had obtained majority status at one time. Similarly, *Sinclair Co.* v. *NLRB*, the only case consolidated with *Gissel* to be treated as a Category I case (395 U.S. at 615), involved a situation in which the union had obtained majority support based on authorization cards. Accordingly, as the Board stated in *Gourmet Foods*, 270 N.L.R.B. No. 113, at 22 (citation and footnote omitted), " 'even under the interpretation of *Gissel* most favorable to [* * * proponents of nonmajority bargaining orders], all that can be fairly said is that the Court left open the issue of whether the Board has the statutory authority to issue a bargaining order in the absence of a showing that the union ever enjoyed majority support.' "[7]

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[7]Moreover, as the court below noted, it was not until 1980 (11 years after the decision in *Gissel*) that "a court squarely held that the NLRB has the authority to issue a bargaining order despite the absence of tangible evidence that the union ever secured the support of a majority of the affected employees," and "[t]he full Board itself did not rule unequivocally on the question until 1982, in the case at hand" (Pet. App. 41a-42a (footnotes omitted)). The Board "took that action by a bare, one-vote margin" (*id.* at 56a). Thus, while petitioner is correct (Pet. 9 & n.4) that the question of the Board's authority to issue non-majority bargaining orders has been widely *discussed*, that remedy has not been widely *used*: the Board has seen fit to employ it only twice in the almost 15 years since *Gissel* was decided.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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National Labor Relations Board

MAY 1984

DOJ-1984-05

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Petitioner,

—*vs.*—

NATIONAL LABOR RELATIONS BOARD and CONAIR CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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Statement of Affiliates and Subsidiaries

1. Continental Conair Ltd .(Hong Kong)
2. Continental Electric Industries, Inc. (Hong Kong)
3. Continental Gourmet, Inc. (Edison, New Jersey)
4. Continental International Corp. (Edison, New Jersey)
5. Tatung-Conair Corp. (Taipei, Taiwan)
6. Zotos International Inc. (Darien, Connecticut)
7. Conair Consumer Products, Inc. (Canada)

Questions Presented

1. Whether the decision of the United States Court of Appeals for the District of Columbia Circuit, refusing to enforce the National Labor Relations Board's issuance of a nonmajority bargaining order, is inconsistent with this Court's decision in *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969) and the provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("Act").

2. Whether the decision of the United States Court of Appeals for the District of Columbia Circuit, refusing to enforce the National Labor Relations Board's issuance of a nonmajority bargaining order, places undue retrictions on the remedial authority of the Board.

3. Whether a conflict between two Circuit Courts of Appeal, alone, mandates that this Court grant a petition for a writ of certiorari.

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No. 83-1520

IN THE

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OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Petitioner,

—*vs.*—

NATIONAL LABOR RELATIONS BOARD and CONAIR CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

Preliminary Statement

Respondent, Conair Corporation ("Company"), pursuant to Rule 22.1 of the Rules of this Court, submits this Brief in Opposition to the Petition for a Writ of Certiorari of Local 222 International Ladies' Garment Workers' Union,

A.F.L.-C.I.O. ("Union"), respectfully urging this Court to decline to review the decision of the United States Court of Appeals for the District of Columbia Circuit ("Circuit Court") and showing:

Counter-Statement of the Case and Facts

a. Counter-Statement of the Case.

This Petition for a Writ of Certiorari arises out of six unfair labor practice charges and a representation petition filed with Region 22 of the National Labor Relations Board ("Board"), against the Company by the Union.[1] On March 8, 1978, after conducting an investigation, the Regional Director of the Board issued a consolidated complaint.[2] On March 23, 1978, hearings were commenced before Administrative Law Judge Jesse Kleiman ("ALJ"), which continued through June, 1978.

On July 30, 1980, more than two years after the close of hearings, the ALJ issued his decision. In his decision, the ALJ found that the Company committed "outrageous and pervasive" unfair labor practices, and ordered the Company to take affirmative steps to remedy them. The Order of the ALJ also contained several extraordinary remedies including: among others, the providing to the union of access to the Company's premises, the placing of newspaper ads, and a personal presidential reading order. However, because the Union failed to demonstrate that it represented a majority of the unit's employees, the ALJ refused to issue a bargaining order.

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[1] Case Nos. 22-CA-7586, 22-CA-7672, 22-CA-7939, 22-CA-8173, 22-CA-8220, 22-CA-8238, and 22-RC-7119.

[2] There were two earlier complaints which were consolidated in the March 8, 1978 Order.

All parties excepted to the ALJ's Decision and on May 28, 1982, over five years after the first charges were filed, the Board issued its Decision and Order.[3] The Board Decision affirmed all the unfair labor practice and remedial findings of the ALJ, but reversed his determination regarding the nonmajority bargaining order and directed the Company to bargain with the Union. Two members of the Board dissented.

The Company petitioned the Circuit Court to review the Order of the Board. The Board filed a cross-petition to enforce its Order and the Union was granted permission to intervene.

On November 15, 1983, the Circuit Court rendered its Decision enforcing in part and vacating in part the Decision and Order of the Board. Of paramount significance, the Court rejected the Board's imposition of a nonmajority bargaining order:

> "On the central issue, we hold that Congress has not empowered the Board to issue a bargaining order absent a concrete manifestation of majority employee assent to union representation." (at 4a)*

b. Counter-Statement of the Facts.[4]

The Company is engaged in the manufacture, sale and

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* a—following a page number are references to the appendix filed with the Petition.

[3] The Board issued a Supplemental Order on June 3, 1982.

[4] The facts of this case are extraordinarily lengthy. The transcript of hearings exceeded twenty thousand pages. Therefore in an effort not to burden the Court, the Company submits a digest of the facts. The facts are set out in detail in the opinion of the Circuit Court (5a-18a).

distribution of hair care, personal grooming, and related products. During this proceeding, the Company maintained administrative offices, conducted warehousing and distribution operations and produced electrical hair care appliances at its facility located in Edison, New Jersey. The Company employed 300 unit workers at Edison, who engaged in production, maintenance, warehousing, shipping, receiving, janitorial and truck driving work.

In March 1977, the Union began an organizational campaign at the Company's Edison facility. In early April, after becoming aware of the Union's campaign, the Company commenced a series of management-employee meetings. At the first of these meetings on April 4, 1977, two executives of the Company spoke to employees, advised them that the Company was aware of the Union's organizing campaign, pointed out benefits presently provided by the Company and cautioned employees, that certain of these benefits might be lost with unionization. At this meeting, the Company also stated that it was planning to adopt changes that would alleviate many employee complaints. On April 6, Conair's President and other executives, met with employees on two occasions. At the first meeting, the President addressed a mass meeting of unit employees in the production area. His remarks tracked earlier remarks made at the April 4 meeting. Later that day, he, along with other executives, met with small groups of unit employees. At these meetings, the Company representatives voiced their opposition to unionization, and re-emphasized the nature and extent of existing benefits provided by the Company.[5]

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[5] The ALJ, the Board and the Circuit Court all held that certain statements made at these meetings violated the Act.

On April 11, 1977, the Union struck.[6] Approximately 125 to 140 unit employees participated in the strike. The strike was marked by substantial union violence. This resulted in the Company securing several injunction and contempt orders against the Union in the Superior Court of the State of New Jersey. The strike ended on September 23, 1977.

During the strike, the Company sent each striker two letters in English and Spanish. The first one dated April 20, 1977 advised employees that they must report to work on April 22, or be deemed to have quit their jobs.[7] The second dated June 9, 1977 rescinded the first, and offered all employees full and immediate reinstatement to their jobs.

On September 23, 1977, the strikers made unconditional offers to return to work. The Company accepted, but did not reinstate the strikers immediately. Instead, as was normal procedure, it required the strikers to complete new job application, insurance and tax forms. From October 4, 1977 through November 7, 1977, most of the strikers were reinstated.[8]

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[6] The ALJ, the Board and the Circuit Court all found this to be an unfair labor practice strike.

[7] The ALJ found the first letter to be a "threat of discharge." However, the Board, without a hearing, reversed this finding and held the letter was an actual discharge in violation of the Act. Because the Company was not provided adequate notice to litigate the April letter as an actual discharge, the Circuit Court reversed the Board's determination (23a-24a).

[8] The Company refused to reinstate several strikers who plead guilty to picket line misconduct. The Circuit Court held that this violated the Act.

On April 13, 1977 the Union petitioned the Board for certification and based on the April meetings, filed unfair labor practice charges against the Company. The Company and Union then entered into a stipulation for a consent election. The election was originally scheduled for May 6, but was postponed, because, on April 25, 1977 the Company filed unfair labor practice charges against the Union alleging picket line misconduct.

On November 23, 1977, the Board approved a Formal Settlement of unfair labor practice charges filed by the Company against the Union.[9] The election was eventually rescheduled for December 7, 1977, a date within the unions 60-day posting period. By scheduling the election during this time, the Board violated its own rules and regulations (see 19a-20a, fns. 48 and 49).

In the two weeks prior to the election, meetings were held between supervisors and employees in which employees were urged to vote "no union."[10] The Union lost the election held on December 7, by a vote of 136 to 69.[11]

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[9] The Union agreed to cease and desist from picket line violence and post a notice (for sixty days) stating that it would refrain from violating the Act.

[10] The ALJ, the Board and Circuit Court held that during the campaign, certain of the supervisors' actions, i.e., threatening plant closure and distributing literature which threatened reprisal and promised benefits for a pro company vote and the Company's earlier behavior at the April meetings, along with the letters and the installation of new benefits, such as the hiring of a bilingual personnel manager, were "outrageous and pervasive" unfair labor practices. As set forth above, because the union never secured majority support from the affected employees, the ALJ refused to issue a bargaining under. However he did order other extraordinary remedies to rectify the situation. The Board upheld the other extraordinary remedies but also imposed a nonmajority bargaining order. The Circuit Court refused to enforce the latter portion of the Board order.

[11] An intervening Teamsters union received eight votes.

Throughout the entire lifespan of this proceeding, the Union never secured a majority of authorization cards from the unit's employees.[12]

REASONS FOR DENYING THE PETITION

POINT I

The decision below is not inconsistent with this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

A. Gissel does not approve nonmajority bargaining orders.

In its petition (pp. 14-16), the Union urges this Court to grant certiorari because the Circuit Court's refusal to enforce the Board's nonmjority bargaining order conflets with this Court's mandate in *NLRB* v. *Gissel Packing Co., supra* ("Gissel"). The Union contends that in *Gissel* this Court held that the Board had authority to order an employer to bargain with a union despite the absence of tangible evidence that the union ever secured support from the majority of affected employees.

This contention is erroneous. Neither in *Gissel,* nor in any other case, has this Court sanctioned the imposition of nonmajority bargaining orders.

In *Gissel,* the Court consolidated four cases for decision.[13] The common ground in each case was that the

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[12] The best the Union could do was obtain cards from 46% of the unit employees.

[13] *NLRB* v. *Gissel Packing Co.*, 398 F.2d 336 (4th Cir. 1968); *NLRB* v. *Hecks, Inc.*, 398 F.2d 337 (4th Cir. 1968); *General Steel Products Inc.* v. *NLRB*, 398 F.2d 339 (4th Cir. 1968); *NLRB* v. *Sinclair Refining Co.*, 397 F.2d 157 (1st Cir. 1968).

Union seeking representation had at one time achieved a majority showing from the unit of employees it sought to represent, but, because of serious employer misconduct, the support had dissipated. Chief Justice Warren described the only questions before the *Gissel* Court:

> "whether union authorization cards, *if obtained from a majority of employees* without misrepresentation or coercion, are reliable enough generally to provide a *valid, alternate route to majority status;* whether a bargaining order is an appropriate and authorized remedy where an employer rejects a *card majority while at the same time committing unfair labor practices that tend to undermine the Union's majority and make a fair election an unlikely possibility.*" (at 579) (emphasis supplied)

The Court held that (1) authorization cards were a valid indicator of majority support, (2) an election was not a union's only reliable means of demonstrating majority status and (3) the duty to bargain under § 8(a)(5) of the Act could be imposed in situations where employee majority sentiment for a union, once expressed, had been dissipated by serious employer misconduct. (at 614)

The Court described three categories of cases when the imposition of a bargaining order might be justified. Significantly, in all three, the Union had obtained a majority showing from interested employees.

In the first category, the Union majority was destroyed because of "outrageous and pervasive" employer unfair labor practices. Under those "exceptional circumstances," the Court recognized that a bargaining order would be justified without the need to evaluate if a fair election could be held. In the second category, the Union majority was dissipated through a lesser degree of, but still "seri-

ous" unfair labor practices. The Court held that, in this category a careful evaluation was required as to whether a fair election could be held. If upon careful evaluation the Board concluded that the employer's behavior had created an atmosphere where a fair election could not be held, a bargaining order would be the appropriate remedy. The third category consisted of circumstances where, after analysis, it was found that the employer's unfair labor practices were not of such a serious nature as to foreclose the holding of a fair election. Here, the Court held, an election and not a bargainnig order was always the proper remedy.

The core issue of the present case arises as a result of the *Gissel* Court's perusal of dictum which appears in two opinions from the Fourth Circuit. See *NLRB* v. *Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967), and *NLRB* v. *Heck's Inc., supra.* The Fourth Circuit suggested that in category one situations, where an employer committed "outrageous and pervasive" unfair labor practices, the Board could issue a bargaining order without the need of inquiry into the union's majority status.[14] The *Gissel* Court reciting this dictum, stated (in dictum of its own):

> "Before considering whether the bargaining orders were appropriately entered in these cases, we should summarize the factors that go into such a de-

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[14] The basis for the Fourth Circuit's dictum was a law review article by then Harvard law Professor Derek Bok. However, as noted by a recent commentator, the Board's decision in the present case ignores the limitations and protections recommended by Professor Bok. See Bok, "The Regulation of Campaign Tactics in Representation Elections Under the NLRA," 78 Harv. L. Rev. 38 (1964); Spelfogel "Employee Representation in Investigative Interviews, Pre-election Propaganda and Nonmajority Bargaining Orders Some Current 'Hot' Issues under the NLRA," 30 Federal Bar News and Journal 448 (November 1983).

> termination. Despite our reversal of the Fourth Circuit below in Nos. 573 and 691 on all major issues, the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in 'exceptional cases' marked by 'outrageous and pervasive' unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair, and reliable election cannot be had . . . The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices." (at 613-614) (citations omitted).

The Union argues that through this dictum, the *Gissel Court* approved the imposition of bargaining orders in circumstances in which the Union never demonstrated majority support.[15]

The Union's argument is misplaced. A close analysis of this portion of the opinion demonstrates that the *Gissel* Court did not state that in exceptional cases a nonmajority

---

[15] Until the present case, the full Board only ordered bargaining orders in cases where the Union had demonstrated majority support.

bargaining order was warranted, rather, it merely repeated the comments of the Fourth Circuit. In fact, in the very next paragraph of the *Gissel* decision, the Court held:

> "The *only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process.* The Board's authority to issue such an order on a lesser showing of employer misconduct is appropropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case of course, *effectuating ascertainable employee free choice becomes as important a goal as deterring employer behavior.*" (at 614) (emphasis supplied)

In *United Dairy Farmers Co-op. Assn.* v. *NLRB*, 633 F. 2d 1054 (3d Cir. 1980), the principal decision relied on by the Union, the United States Court of Appeals for the Third Circuit confirmed this view. In that opinion, the Court held that the issue of whether the Board had the authority to issue nonmajority bargaining orders was not reached by the *Gissel* Court.

> "Thus in reviewing its decision, we are presented with an *issue commented on in dictum by the Supreme Court in NLRB* v. *Gissel, . . . but not specifically reached*: whether and under what circumstances the Board has remedial authority to order an employer who has committed unfair labor practices to bargain with a union that has never won a certification election or secured a card majority." (at 1056) (emphasis supplied)

A plausible explaination of what the *Gissel* Court meant by its controversal dictum was set forth in the Circuit Court's decision:

"The Supreme Court's reference in *Gissel* to the possibility of Board-imposed bargaining orders 'without need of inquiry into majority status' perhaps has been read to indicate more than the Court intended. Prior to its reference to the Fourth Circuit's *Logan Packing* dictum, the Supreme Court had set out its reasons for disagreeing with the Fourth Circuit's approach 'on all major issues,' 395 U.S. at 613, including that Circuit's distrust of union authorization cards, its view that the 1947 Taft-Hartley amendments had ruled out bargaining orders on the basis of card majorities, and its refusal to accept the Board's *Cumberland Shoe* doctrine. *Id.* at 595-610. The Court then softened its multiple rejections of Fourth Circuit positions by pointing out that the Circuit had 'left open the possibility' of issuing bargaining orders without inquiry into majority status in sufficiently egregious cases. *Id.* at 613; see *Logan Packing*, 386 F.2d at 570 (Board 'may have the power' to impose a bargaining order as a remedy for egregious unfair labor practices).

Because *Logan Packing*, in dictum, had raised the possibility of Board-imposed bargaining orders in 'exceptional cases' marked by 'outrageous and pervasive' unfair labor practices, the Supreme Court in *Gissel* was able to say that 'the actual area of disagreement between our position here and that of the Fourth Circuit is not large.' *Gissel*, 395 U.S. at 613. Thus, the High Court's concentration apparently was on the quality of employer conduct *Logan Packing* indicated might justify a bargaining order, not on the notion that such an order could issue 'without need of inquiry into majority status.

> The probability that the High Court referred *casually* to dispensing with inquiry into majority status is heightened by the statement the Court made immediately after it set out the *Logan Packing* dictum:
>
> The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices.
>
> *Gissel*, 395 U.S. at 614. The Court cited two cases as illustrative of the Board's policy: *United Steel-Workers of America* v. *NLRB*, 376 F.2d 770 (D.C. Cir. 1967), and *J.C. Penney Co.* v. *NLRB*, 384 F.2d 479 485-86 (10th Cir. 1967). Both involved employer misconduct designed to destroy the union's card majority." (47a fn 83) (emphasis supplied)

The Union also asserts that Gissel recognized that nonmajority bargaining orders do not prejudice employees Section 7 rights (see Petition, pp. 12-13). In support of this argument, the Union relies on this Court's decision in *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944) ("Franks Bros."). This reliance is specious.

In *Franks Bros.*, the Court held that an employer was required to bargain with a union that at one time represented a majority of employees, but lost that majority due to the employer's subsequent unlawful action.

A close study of that decision demonstrates that it is fully consistent with *Gissel*. In both cases, this Court held that bargaining orders were appropriate remedies, when the record proved *that at one time the union represented a majority of employees*, but that majority status had been erroded because of unlawful employer conduct.

The seminal issue in the present case is entirely different from both *Gissel* and *Franks Bros.* The result the Union seeks here would not return conditions to the *status quo,* the goal accomplished by the *Franks Bros.* and *Gissel* decisions. Rather it would impose upon employees of the Company a union that they never chose. Such a result is prohibited by both directives of this Court and the Act itself.

A review of the relevant provisions of the Act and this Court's decision in *International Ladies' Garment Workers' Union* v. *NLRB,* 366 U.S. 731 (1961) demonstrates that the Board may only require employers to bargain with representatives designated by a majority of employees.

Section 7 of the Act states:

> "Employees shall have the right to self orgainization, to form, join or assist labor organizations, to bargain collectively *through representatives of their own choosing,* and to engage in other concerted activities for the purpose of collective brgaining or other mutual aid or protection, and *shall also have the right to refrain from any or all such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by §8(a)(3)." (emphasis supplied)

Section 9(a) of the Act reads in part:

> "Representatives designated or selected for the purposes of *collective bargaining by a majority of the employees in such unit* shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment."

In *International Ladies Garment Workers Union* v. *NLRB, supra,* this Court concluded that it was an unfair labor practice for an employer to bargain with a Union that never demonstrated it represented a majority of affected employees:

> "[The employer] granted exclusive bargaining status to an agency selected by a *minority of its employees,* thereby impressing that agent upon the nonconsenting majority. There could be no clearer abridgement of § 7 of the Act, assuring employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity. It follows without need of further demonstration, that the employer activity found present here violated § 8(a)(1) of the Act which prohibits employer interference with, and restraint of employee exercise of § 7 rights." (at 737-738, footnote omitted) (emphasis supplied)

Finally, the Union's attempt to portray this Court's discussion of the Fourth Circuit's *Sinclair* decision as warranting nonmajority bargaining orders is factually erroneous and inconsistent with the holding of that case. (See Petition pp. 13-14).

There is nothing in *Gissel* which either classifies *Sinclair* as a category one case nor justifies the imposition of nonmajority bargaining orders. *Sinclair* stands only for the proposition that a union which had at one time garnered majority support, that was dissipated due to serious employer misconduct may be entitled to a bargaining order, only if upon analysis it is determined that a fair election could not be held and conditions could not be returned to the status quo.

B. The Board has failed to make the necessary showing as to why a bargaining order is the appropriate remedy.

In addition to the fact that a bargaining order is inappropriate in this case due to the failure of the Union to achieve a majority showing, there are several other reasons why the bargaining order imposed by the Board was not warranted. Simply stated, the Board failed to provide a reasonable analysis and articulation of reasons why a bargaining order was necessary and why a fair election could not be held today.

Recent case law throughout the Circuit Courts has uniformly criticized the Board for its failure, as here, to provide an analysis, reviewing changes in circumstances such as employee turnover, passage of time, the installation of new management, and other mitigating circumstances prior to issuing a bargaining order. See, *NLRB* v. *Pace Oldsmobile Inc.*, 681 F.2d 99 (2d Cir. 1983), *Peoples Gas System Inc.* v. *NLRB*, 629 F.2d 35 (D.C. Cir. 1980); *NLRB* v. *Western Drug*, 600 F.2d 1325 (9th Cir. 1979). In the present case, the Board failed to make any analysis or findings regarding these factors. We submit that absent such an analysis by the Board, the Circuit Court's decision must stand on that ground alone and the Petition for Certiorari must be rejected.

POINT II

The decision below does not place undue restrictions on the remedial authority of the NLRB.

In its Petition (pp. 16-18), the Union contends that the Circuit Court's refusal to enforce the Board's nonmajority bargaining order places severe restrictions on the remedial authority of the Board to administer the statute effectively. Yet, nothing in the Act authorizes the Board to impose nonmajority bargaining orders as a remedy for unlawful employer behavior and the Board itself now realizes that it does not have the statutory authority to impose this remedy. *Gourmet Foods, Inc.,* 270 NLRB No. 113 (May 18, 1984).

> ". . . We conclude that nonmajority bargaining orders are not within our remedial discretion." (at 22)

In *H.K. Porter Co.* v. *NLRB,* 397 U.S. 99 (1970), this Court described the limitations of the Board's remedial authority. The Court held that Section 10(c) of the Act provides that the Board may impose only such remedies as will effectuate the policies of the Act (at 108). A nonmajority bargaining order is a remedy that does not effectuate the policies of the Act. This is because the Act is based on the corner-stone principle of majority rule. As Senator Wagner, the chief sponsor of the Act, articulated:

> "Democracy in industry must be based upon the same principle as democracy in government. *Majority rule, with all its imperfections, is the best protection of workers' rights,* just as it is the surest guarantee of political liberty that mankind has yet discovered." 79 Cong. Rec. 7671 (1935). emphasis supplied)

From the inception of the Act, this Court has recognized that its fundamental purpose was to safeguard employee rights to self-organization and to promote the achievement of industrial peace through the election of majority representatives of the employee's own choosing *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). A union chosen, not by the employees themselves but on speculation by "big brother NLRB" (46a) does not in any way further this basic purpose.

NLRB Member Hunter, commenting on this intrusion, stated:

> "When all is said and done, it is the particular employees involved here who will have to live with the Boards selection of a bargaining representative for them. And this selection has been accomplished without benefit of an election or *any other* clear objective manifestation that the selection of that representative reflects the wishes of a majority of the employees. Of course, at the heart of it, that is the fatal flaw in the approach endorsed by the majority. Thus, in the absence of clear evidence, they are reduced to *speculating, hypothesizing, and at the bottom, guessing about the sentiment of a majority of the employees.* For my part, speculation and guess work are no substitute for objective evidence of majority status and are simply not a proper basis for imposing on employees a bargaining agent not of their choosing." (at 141a) (emphasis supplied)

Since the mandate of the Act does not permit the imposition upon employees of a union they did not choose, the remedial authority of the Board under § 10(c) of the Act is in no way restricted by the failure of this Court to adopt the remedy of a nonmajority bargaining order.

This point was best summed up by the Circuit Court when it held:

> "Nothing now in the text of the governing statute or in its legislative history, suggests that Congress contemplated general authority in the Board to select or designate a union for employees, a majority of whom never signaled assent to the arrangement." (at 45a)

POINT III

Although the decision below conflicts with the decision of the United States Court of Appeals for the Third Circuit in *United Diary Farmers Cooperative Assn.* v. *NLRB*, 633 F.2d 1054 (3d Cir. 1980) that alone, is not sufficient grounds for this Court to grant certiorari.

It is undisputed that as a result of the Circuit Court's decisions, a conflict presently exists between the only two circuit courts to have ruled on the issue of whether the Board has statutory authority to issue a nonmajority bargaining order.[16] However, the fact that a conflict exists does not require that this Court grant certiorari.

Rule 17.1 of the Rules of the Supreme Court, sets forth the Court's considerations when determining whether to grant certiorari:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be

[16] Although the Union in its Petition (pp. 14 fn 7) seeks to convince this Court that other circuits have sanctioned nonmajority bargaining orders, the only two circuits to have confronted this issue squarely are the Third and D.C. Circuits.

> granted only when there are special and important reasons therefor."

Under Rule 17, a circuit court decision that is in conflict with existing court of appeals authority may provide a reason which the court will consider in determining whether to grant certiorari. However, the existence of a conflict is not by itself determinative. Indeed, this Court has denied certiorari in several recent cases where there was a square and irreconcilable conflict between the circuit courts. Compare, *Muley* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), with *Fields Productions Inc.* v. *United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971); see also *California Dept. of Industrial Relations* v. *Homemakers Inc.*, 423 U.S. 1063 (1976) (White and Blackman, J.J. dissenting from denial of certiorari).

In *Freeman Guardian, et al.* v. *Flake, et al.*, 405 U.S. 1032 (1972) (Douglas, J. dissenting from denial of certiorari), this Court denied certiorari despite the fact that eight circuit courts had divided evenly on the important constitutional question of public school hairstyle regulations. After analyzing these cases, one leading team of Supreme Court scholars commented:

> "the Court as a whole now seems committed to giving the existence of a conflict less than decisive weight." *Stern & Gressman*, Supreme Court Practice, § 4.1, at 269 (5th ed. 1978).

The denial of certiorari is particularly appropriate in this case. The time is not ripe for the Court to resolve this conflict since only two circuit courts have squarely addressed the issue at bar.[17] The present issue is admit-

[17] There is also evidence that the Third Circuit is in a state of confusion as to when bargaining orders, if ever, are to be granted. See *NLRB* v. *K&K Gourmet Meats, Inc.*, 640 F.2d 460 (3d Cir. 1981), (Gibbons dissenting).

tedly one of great concern to the entire labor bar. However, before this Court examines the appropriateness of nonmajority bargaining orders, it should (as it has done in the past in cases involving important issues) wait for additional case law which might produce a consensus or a satisfactory majority among the circuit courts. *Id.* at 269 n. 32; *Freeman Guardian, et al.* v. *Flake, et al, supra. See also Dupuy* v. *Dupuy,* 434 U.S. 911, 912 (1977) (White, J. dissenting).

POINT IV

This Court should not grant certiorari, because in *Gourmet Foods, Inc.*, 270 NLRB No. 113 (May 18, 1984) the NLRB held that it does not have the statutory authority to issue a nonmajority bargaining order.

In conclusion, we call the Court's attention to the fact that the Union, and not the Board, has petitioned for certiorari. This is because the present Board has reevaluated its decision below and its *United Diary Farmers* decision and is now of the belief that it does not possess the authority to issue a nonmajority bargaining order and that a nonmajority bargaining order is not an appropriate remedy.

In *Gourmet Foods, Inc., supra,* the Board held:

> "Accordingly, we overrule those cases [including CONAIR] in which the Board has found that it has statutory remedial authority to issue nonmajority bargaining orders and in which the Board has exercised that authority." (at 16-17)

In light of the Board's turnaround and its decision in *Gourmet Foods,* this Court should not grant the Union's petition for a writ of certiorari. See *Woodkraft Division, Georgia Kraft Company* v. *NLRB,* No. 83-103, —— U.S. ——, 80 L.Ed.2d 149, 115 LRRM 3296 (1984).

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 83-1520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and CONAIR CORPORATION,
Respondents.

On Petition from the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. The focus of the memorandum in opposition filed by the National Labor Relations Board is on the NLRB's recent decision in *Gourmet Foods, Inc.*, 270 N.L.R.B. No. 113 (May 14, 1984), which was issued after our petition for certiorari was filed. In *Gourmet Foods* the NLRB overruled its decision in the instant case and held that "nonmajority bargaining orders are not within our remedial discretion." 270 N.L.R.B. No. 113, slip op. at 22.

We acknowledge, of course, that the effect of *Gourmet Foods* is to make the NLRB a respondent in this case in fact as well as in name. But far from suggesting that review in this Court is unwarranted, the fact that the NLRB has reversed its field highlights the showing in our petition that the law on the issue presented here is in flux and thus provides an added ground for granting a writ of certiorari.[1]

2. The NLRB argues that notwithstanding its own internal disagreements and notwithstanding the fact that "the decision of the court of appeals here conflicts with the holding of the Third Circuit that the Board possesses authority to issue non-majority bargaining orders," NLRB Mem. at 5, our petition should be denied. Two justifications are proffered; neither can withstand analysis.

(a) The NLRB first argues that the question of the Board's statutory authority to issue what the Board labels "non-majority bargaining orders" is, at present, "academic" because "it is the position of two members of the current four-member Board that, even if the Board were empowered to issue non-majority bargaining orders . . . as a matter of policy [these two members] would prefer to refrain from doing so." *Id.* The two Board members who have expressed this position appear to have lost sight of their subordinate position in the legal hierarchy.

As this Court has had frequent occasion to remind the Board, Congress is the "expositor of the national interest" with respect to the national labor policy, *Ma-*

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[1] Given the clarity with which the current Board majority has set forth its views on the question of its authority to issue bargaining orders in cases such as this, there is nothing to be gained in terms of this Court being fully advised by deferring review of that question until "a case that reflects the current position of the Board," as the NLRB's Memorandum in Opposition (at 5) suggests. And if, as we argue, the decision below is wrong, such a deferral would deny the petitioner its rights.

chinists Local v. *Labor Board*, 362 U.S. 411, 429 (1960); "[t]hat policy cannot be defeated by the Board's policy," *id.*, *quoting Colgate Co.* v. *Labor Board*, 338 U.S. 355, 363 (1949). *See also, e.g.*, *American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 318 (1965). And, as the just-cited cases among many others establish, it is ultimately for this Court to determine as a matter of statutory interpretation whether Congress has established a policy which controls the resolution of a particular question.

Because that is so, a determination by this Court as to whether Congress has authorized the NLRB to exercise a particular power can never be "academic" to a determination by the Board as to the circumstances in which the agency will exercise that power, for the parameters of the NLRB's discretion are necessarily bound by the judgments Congress has made, as those judgments are definitely declared by this Court.[2] The instant case illustrates the point well. The question of statutory authorization presented herein boils down to whether Congress intended to foreclose absolutely the issuance of remedial bargaining orders whenever a union has been unable to obtain a majority of authorization cards or whether, *per contra*, Congress did not intend to place dispositive weight on the presence or absence of a card majority.[3] That question would be "academic" only if the Board were free, "as a matter of policy," to treat the absence of a card majority as determinative even if Congress had made a contrary decision. But the Board

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[2] To quote Judge Hutcheson's pithy words, "[t]he Board is a mere creature of the law. It is no 'Poo Bah' to loose or bind at will." *NLRB* v. *Dorsey Trailers*, 179 F.2d 589, 592 (5th Cir. 1950).

[3] Of course, we believe that this question has already been answered in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), *see* Pet. at 10-14 and p. 5 *infra*, but the analytical point made in text is valid however *Gissel* is read.

plainly is not free to so override congressional determinations.[4]

The short of the matter is that this Court's resolution of the legal question presented here, far from being of academic interest, will go to the very essence of whether the Board can and should issue remedial bargaining orders in cases like this. The memorandum in opposition's contrary contention reflects the NLRB's failure to understand that its role is to exercise whatever discretion the Board has been delegated in light of the law as declared by this Court and not in blind disregard of that law. The extent of that misunderstanding is shown by a comparison of the NLRB's strained effort to find in *Gourmet Foods* an occasion to overrule its decision in this case while this petition for certiorari was pending, *see* 270 NLRB No. 113, slip op. at 2-7, ostensibly to clarify the law and avoid "needless litigation," *id.* at 7 n.24, with the NLRB's even more strained effort in the memorandum in opposition to dissuade this Court from truly clarifying the law by reviewing the basic legal question of the NLRB's statutory authority to issue remedial bargaining orders in cases such as this.

(b) The NLRB (and Conair) also contend that the decision of the court below is not inconsistent with this

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[4] In *Gourmet Foods* the two members of the Board who stated that, "as a matter of policy," they would never issue a "non-majority bargaining order" even if the Board on which they sat had been empowered by Congress to do so purported to base their "policy" determination upon the same ground on which they based their "legal" determination that they lacked the authority to issue such orders: their conclusion, drawn from their "review of the statute, its legislative history, Board and court precedent, and legal commentary," that such bargaining orders offend "an integral part of the Act's current substance and procedure." 270 NLRB No. 113, slip op. at 16. If this Court were to conclude that those members were wrong as a matter of law in their reading of the Act's "substance and procedure," the Court's conclusion necessarily would undermine the members' policy determination as well.

Court's decision in *NLRB v. Gissel Packing Co., supra.* According to the NLRB, *Gissel* merely "noted dictum of the Fourth Circuit suggesting that a bargaining order might be appropriate" where an employer's outrageous and pervasive unfair labor practices have foreclosed employee free choice. NLRB Mem. at 6.

Even if the Board's interpretation of *Gissel* were accurate, it would hardly detract from our petition, since all that the Board is claiming is that the question presented here is an open one in this Court; in that event the conflicting decisions of the Board and of the lower courts on that question, coupled with the importance of the question, would provide more than ample grounds requiring review by this Court. But he that as it may, the Board's interpretation of *Gissel* cannot be squared with the reasoning by which the *Gissel* Court affirmed the bargaining order in *Sinclair*, one of the consolidated cases decided by *Gissel*. We quoted this Court's discussion of *Sinclair* in our petition (at p. 13); neither the NLRB nor Conair comes to grips with that discussion in their memoranda.

CONCLUSION

For the foregoing reasons, and those stated in our petition, a writ of certiorari should be granted.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE COUNCIL ON LABOR LAW EQUALITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and CONAIR CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE COUNCIL ON LABOR LAW EQUALITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Council on Labor Law Equality ("COLLE") is a national association of large and small employers formed to monitor the activities of the National Labor Relations Board and related developments under the National Labor Relations

Act and to provide support to employer interests on those issues which affect a broad section of industry. COLLE was formed in recognition of the need for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the formation and interpretation of national labor policy. It is within the interest of employers throughout the nation to assure that the Board's remedial authority is confined to its appropriate sphere and invoked under procedural strictures sufficient to permit informed judicial review.

COLLE filed a brief amicus curiae in support of the position of Conair Corporation in the District of Columbia Circuit in this case.* This brief amicus curiae is filed with the consent of the parties as provided for in the rules of this Court.

ISSUE PRESENTED FOR REVIEW

Whether the National Labor Relations Board has the remedial authority to order an employer who has committed unfair labor practices to bargain with a union that has neither won a certification election nor secured a card majority.

DECISION BELOW

A panel of the District of Columbia Circuit held, over Judge Wald's dissent, that the NLRB does not have authority to issue nonmajority bargaining orders. *Conair Corp.* v. *NLRB*, 721 F.2d 1355 (D.C. Cir. 1983).

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* COLLE also has previously filed briefs amicus curiae in this Court and in *NLRB v. Transportation Management*, 82-168; *Red Ball Motor Freight, Inc. v. NLRB*, 81-1605; and *Pioneer Finishing Corporation v. National Labor Relations Board*, 81-2162

ARGUMENT

I. INTRODUCTION

From the time that the founders of this nation severed the colonies from the crown, there has been one cardinal principle, above all others, that describes the way we are governed: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of a representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also Baker v. Carr*, 369 U.S. 186 (1962)(state legislative apportionment); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)(racially based gerrymandering); *United States v. Classic*, 313 U.S. 299 (1941) (alteration of ballots); *United States v. Mosley*, 238 U.S. 383 (1915) (right to have vote counted); *Ex Parte Siebold*, 100 U.S. 371 (1880) (ballot box stuffing). Our fidelity to the freedom of electoral choice springs from the recognition that "[o]ther rights, even the most basic are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

This principle is no less important in the context of a union election. "The necessity for choosing collective bargaining representatives brings the same nature of problem to groups of organizing workmen that our representative processes bring to the nation." *Thomas v. Collins*, 333 U.S. 516, 546 (1945) (Jackson, J., concurring). Indeed, the impact of one's vote to select or reject a bargaining representative is more directly felt, in every day life terms, than his vote to elect a legislative representative in a distant state capitol or an even more remote Washington. For this reason, the overriding purpose of the National Labor Relations Act is to assure that employees are represented by a representative *of their own choosing* for the purpose of collective bargaining.

The decision below does no more than sustain the traditional principle regarding the right to vote for one's own representative as that basic right is codified in the NLRA.

II. THE DECISION BELOW IS NOT INCONSISTENT WITH THE HOLDING IN *NLRB V. GISSEL PACKING CO.*, 395 U.S. 486 (1969).

A. The Holding

Gissel arose on the consolidated consideration of four cases[1] which originated in different factual settings but contained two common threads: serious unfair labor practices by an employer during a union recognition campaign; and authorization cards signed by a majority of the employees. Chief Justice Warren articulated the issues before the Court as follows:

> The specific questions facing us here are whether the duty to bargain can arise without a Board election under the Act; whether union authorization cards, if obtained from a majority of employees without misrepresentation or coercion, are reliable enough generally to provide a valid, alternate route to majority status; whether a bargaining order is an appropriate and authorized remedy where an employer rejects a card majority while at the same time committing unfair labor practices that tend to undermine the union's majority and make a fair election an unlikely possibility. 395 U.S. at 579.[2]

In the series of decisions under review, the Fourth Circuit, contrary to the First Circuit, had held that a bargaining order

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[1] The decisions reviewed in *Gissel* were NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968), *modifying* 157 N.L.R.B. 1065 (1966); NLRB v. Heck's, Inc., 398 F.2d 337 (4th Cir. 1968), *modifying* 166 N.L.R.B. 186 (1967); General Steel Prods., Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968), *modifying* 157 N.L.R.B. 636 (1966); NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968), *enforcing* 164 N.L.R.B. 261 (1967).

[2] An additional question, not relevant here, concerned the First Amendment implications of certain employer statements alleged to be unfair labor practices.

was not an appropriate remedy for unfair labor practices that undermine a union's card majority. Its holding was based upon the inherent unreliability of authorization cards and the conclusion that the Taft-Hartley amendments altered the effect of prior decisions by eliminating all avenues of union recognition beyond Board certification following an election.

The Court unanimously rejected the Fourth Circuit's position by holding tht election and certification, although the "most commonly traveled route," was not the only method for acquiring exclusive bargaining rights. It concluded that Taft-Hartley did not alter its prior decisions because, while making election the sole basis for certification, it did not abrogate the employer's continued duty to bargain with a union which had established majority status by other means. The Court buttressed its conclusion by acknowledging that language which would have eliminated recognition of a card majority was removed from the final draft of the bill. 395 U.S. at 598.

Having concluded that certification following an election was not the sole route to recognition, the Court considered whether authorization cards were inherently unreliable. Deferring to the Board's ability to limit card abuse, the Court refused "to agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else." 395 U.S. at 607.

The employers argued that these conclusions left them with a Hobson's choice. They would either commit unfair labor practices in conducting an immediate investigation into whether the union represents an uncoerced majority or fail to satisfy the Board's standard that they have a good faith doubt as to majority status before refusing to bargain. This contention was rejected upon the proposition that an employer is not obligated to investigate employee status in order to demand an election; and, if he elects to do so, may undertake reasonable investigatory steps, under Board rules, without committing unfair labor practices. 395 U.S. at 609-10.

With the employers argument resolved against them, the Court compartmentalized the scope of the Board's bargaining order authority into three distinct unfair labor practices categories. Under Category I, the employer's misconduct is so aggravated that its "coercive effects cannot be eliminated by the application of traditional remedies" and, therefore, no unlawful refusal to bargain—or even a bargaining demand—need be found for a bargaining order to issue. 395 U.S. at 614. Category II consisted of "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede election processes"; and a bargaining order should issue only when "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards, would, on balance, be better protected by a bargaining order." 395 U.S. at 614-15. Category III involved "minor or less extensive unfair labor practices" which result in minimal disruption of the election process and will not support issuance of a bargaining order. 395 U.S. at 615.

Identifying the factual situations before it in *Gissel* as Category II violations, the Court delineated its holding with precision:

> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should re-emphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior.

395 U.S. at 614. As the Court noted, the scope of its *Gissel* ruling goes no further than situations in which the union, at some point, had a majority.

B. The Obiter Dicta

The dispute at bar is not governed by the narrowly defined lines that compose the *Gissel* ruling. However, in introducing the Category I situation, the Court issued the following dicta that was totally foreign to the facts before it:

> Despite our reversal of the Fourth Circuit below ... on all major issues, the actual area of disagreement between our position here and that of the Fourt Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, *without need of inquiry into majority status on the basis of cards or otherwise,* in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." NLRB v. Logan Packing Co., 386 F2d 562, 570 (CA4th Cir. 1967); see also NLRB v. Heck's, Inc. 398 F2d 337, 338.

395 U.S. at 613-14 (emphasis added).

The citation of the two Fourth Circuit decisions in the referenced quotation further mitigates the viability of *Gissel* as authority for the issuance of nonmajority bargaining orders. In *Hecks, Inc.*, the lower court denied enforcement of a Board bargaining order to a card majority union because the factual situation was not one of those "extraordinary cases in which a bargaining order might be an appropriate remedy..." 398 F.2d at 339. In *Logan Packing,* the court refused to enforce a bargaining order based on a card majority because the employer's unfair labor practices were "very minimal infractions". 386 F.2d at 570. Having resolved the case before it, the Fourth Circuit, in its own dicta, suggested that, in "exceptional cases, the Board *may* have the power to impose a bargaining order ...

without need of answering the question of whether the union ever obtained majority status." 386 F.2d at 570. (emphasis added).

Thus, it is clear that the *Gissel* reference to nonmajority bargaining orders was dicta based on lower court dicta. As the commentators have recognized, "Not even remotely did the Supreme Court intimate that this was *its* view ... [T]he Court was adverting to language in *Logan Packing*, where the Fourth Circuit was discoursing on an obviously hypothetical, if not far-fetched situation, and was not expressing a legal position—the issue was not before it."[3]

Although a landmark decision in many respects, *Gissel* does not stand for the proposition that the Board may issue a bargaining order on behalf of a union that has never received majority authorization.

III. THE DECISION BELOW DOES NOT CREATE A GENUINE CONFLICT IN THE CIRCUITS

Before *Gissel*, the Board consistently declined to order bargaining to remedy employer unfair labor practices when the union had not obtained a card majority. Thus, in *W.H. Elson Bottling Company*, 155 NLRB 714 (1965), *enforced as modified*, 379 F.2d 223 (6th Cir. 1967), the Board, acknowledging that "the possibility is strong that but for [the employer's] unlawful conduct the Union would have ultimately" attained majority status, concluded that "in consideration of the majority principle ... of the Act ... the policies of the Act [do not]

[3] Platt, *The Supreme Court Looks At Bargaining Orders Based On Authorization Cards*, 4 U.Ga.L.Rev. 779, 797 (1970); *see also* Note, *Bargaining Orders Since Gissel Packing: Time to Blow The Whistle On Gissel*, 1972 Wis.L.Rev. 1170, 1182. Golub, *The Propriety of Issuing Gissel Bargaining Orders Where the Union Has Never Attained a Majority*, 29 Labor L.J. 631 (1978); Note, *NLRB v. Gissel Packing Co.: Bargaining Orders and Employee Free Choice*, 45 NYUL Rev. 318, 344 n. 88 (1970).

require or even permit the issuance of a bargaining order where majority status has been attained." 155 NLRB at 715-16.[4] This policy did not change in the immediate aftermath of *Gissel;* and the Board repeatedly rejected nonmajority bargaining orders entered by Administrative Law Judges under the authority of *Gissel.*[5]

A potential policy change arose in the series of decisions involving *United Dairy Farmers Coop. Ass'n,* 242 NLRB 1026 (1978), *remanded,* 633 F.2d 1054 (3d Cir. 1980), *on remand,* 257 NLRB ____ (1981). There, in light of a documented record of pervasive and egregious unfair labor practices trenching upon a free election, the Board issued three separate opinions with respect to its authority to issue a bargaining order in the absence of a union's majority status. The plurality, composed of two members, suggested that the Board *may* have the authority to compel bargaining with a nonmajority union in appropriate cases, but declined to do so on the facts; two members dissented on the ground that the order should have been entered; Member Penello concurred in the judgment but dissented from the conclusion that authority existed to enter bargaining orders in derrogation of the majority rule precept.

The Third Circuit confronted the issue on petitions for review and cross-application for enforcement. Enforcing the Board's conclusion that the employer's conduct was sufficiently offensive to set aside an election that the union had lost, the court felt compelled, in light of Member Penello's opinion, to review the Board's authority to issue a nonmajority bargaining order as an additional remedy.

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[4] See also Int'l Union of Electrical Radio & Machine Workers, 159 NLRB 1795 (1966), *enf'd as modif'd, 383 F.2d 230* (D.C. Cir. 1967), *cert denied,* 390 U.S. 904 (1968); J.P. Stevens & Co., 157 NLRB 869 (1966), *enf'd as modif'd,* 380 F.2d 292 (2d Cir. 1967), *cert denied,* 389 U.S. 1005 (1967).

[5] *See, e.g.,* Fuqua Homes Missouri, Inc., 201 NLRB 130 (1973); GTE Automatic Electric, Inc., 196 NLRB 902 (1972); The Loray Corp., 184 NLRB 557 (1970).

Although the decision may be viewed as an advisory opinion at best and judicial over-reaching at worst, a panel of the Third Circuit concluded that *Gissel* stood for the following proposition:

> The failure to recognize the authority of the Board to issue bargaining orders in these circumstances would undermine the underlying goal of the Act to further the majority preference of all employees. Unions which would have attained a majority in a free and uncoerced election if the employer had not committed unfair labor practices would be deprived of recognition merely because of the employer's illegal conduct.

633 F.2d at 1068 (footnote omitted). Accordingly, the case was remanded to the Board to consider whether the underlying facts justified the issuance of a nonmajority bargaining order.[6]

On remand, the Board directed the employer to bargain with the union. However, at the time of the decision, two seats on the Board were vacant and member Zimmerman, who was

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[6] Whether *United Dairy* represents a majority view in the Third Circuit is open to question. In cases in which a bargaining order is granted to a union that represents a dissipated majority, that court's approach has been characterized "guerilla warfare against *Gissel* orders ...." NLRB v. K & K Gourmet Meats, Inc., 640 F.2d 460, 671 (3d Cir. 1981)(Gibbons, J., dissenting):

> It is no secret that at least a significant minority of the members of this court believe that the Supreme Court in [*Gissel*] erred in interpreting the National Labor Relations Act to permit the National Labor Relations Board to enter a bargaining order as a remedy for unfair labor practices committed in the course of an organizing campaign. Nor is it any secret that those judges who are uncomfortable with the *Gissel* construction of the statute have been signalling the Board vigorously that bargaining orders are unwelcome in this circuit. At the same time the Board is receiving from a different group of judges on this court a quite different signal.

Id. at 670 (citations omitted).

appointed after the Board's first *United Dairy* decision, felt compelled to supply the deciding vote on the ground that the Third Circuit's decision was binding on the Board in the context of that case. He, therefore, felt it unnecessary to decide whether the Board had the general authority to issue nonmajority bargaining orders.

Thus, prior to the Board's decision below, a majority of the full Board had *never* ordered an employer to bargain with a union that had not established majority status as a remedy for unfair labor practices.

IV. THE MERITS

The NLRB's attempt to order an employer to bargain with a union that has never attained majority status is erroneous because an order of this nature: (a) is not authorized by the text of the National Labor Relations Act; (b) would compel the employer to engage in prohibited conduct; (c) is beyond the scope of the Board's remedial authority; and (d) transcends the Board's role in the administration of labor policy.

A. National Labor Relations Act

From its inception, the basic thrust of the NLRA has been to protect the right of employees to select union bargaining representatives in a free and uncoerced manner. By its own terms, the Act provides employees with the right to select bargaining representatives "of their own choosing." 29 U.S.C. §157. Simultaneously, through the 1947 Taft-Hartley amendments, employees have the "right to refrain from any or all of such activities." 29 U.S.C. §157. Moreover, representatives selected "by a majority of the employees" are entitled to exclusive representation of those employees. 29 U.S.C. §159(a).

The literal text of the Act discloses three basic propositions: majority rule: the protection of minority rights; and absolute freedom of choice. Strict adherence to these postulates is essential to promote the Act's objective of industrial peace. That majority rule was the critical feature of the Wagner Act is

evidenced by Senator Wagner's recognition of the underlying principle of the Act that bore his name:

> [D]emocracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered.

79 Cong.Red. 7571, II Legis.Hist. 2337 (1935).

As the congressional mandate translates to union election practices, it is clear beyond purview that, "[i]n their selection of a bargaining representative, §9(a) of the Wagner Act guarantees employees freedom of choice and majority rule." *Intern'l Ladies Garment Workers v. NLRB*, 366 U.S. 731, 738 (1961). Thus, "[a]ny procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice." *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973):

> The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a nonunion shop or for a nonunion shop and against a union.

414 U.S. at 280. Here, the Board did more than "cast their weight." It selected, in its bureaucratic wisdom, a bargaining representative for employees whose freedom of choice was freely cast asunder. The Act not only fails to authorize this result, but expressly forbids it.

B. The Order Compels A Prohibited Practice

A second statutory barrier to the order issued by the NLRB arises from the fact that the Act makes it an unfair labor practice for an employer to interfere with the organizational rights of employees or to support a particular labor organization. These provisions have been construed to prohibit an employer from recognizing a minority union.

The issue was confronted directly in *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 732-38 (1961), where this Court found it an unfair labor practice for an employer to bargain with a minority union:

> [The employer] granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. There could be no clearer abridgment of §7 of the Act, assuring employees the right "to bargain collectively through representatives of their own choosing" or "to refrain" from such activity. It follows, without need of further demonstration, that the employer activity found present here violated §8(a)(1) of the Act which prohibits employer interference with, and restraint of, employee exercise of §7 rights.

A minority bargaining order violates the underpinnings of *Ladies Garment Workers*. The minority union would have a Board sanctioned "marked advantage" of the type condemned by the Court; and its selection would trench upon the protected prerogatives of the employees under the Act. The Board, having historically construed the Act—with judicial approval—to prohibit the recognition of minority unions, should not now be allowed to turn a shield into a weapon.

C. The Order Exceeds The Board's Remedial Authority.

The Board's broad remedial authority is not without limitation. Traditionally, it has been employed to restore the status quo ante in order to facilitate the objectives of the Act in an atmosphere of freedom of choice. Thus, in *Gissel*, the Court concluded that the authority to issue a bargaining order to a card majority union was the "only fair way to effectuate employee rights [and] to reestablish the conditions as they existed before the employer's unlawful campaign." 395 U.S. at 612.

However, the Board's authority to order affirmative action "does not go so far as to confer punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938); *see United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651, 655 (1961).

The authority to command affirmative action is, therefore, confined by the sphere of the Act's literal objectives. In order to justify judicial enforcement, the particular remedy ordered by the Board not only must be designed to restore the status quo ante, it also must be consistent with the underlying objectives of the Act. The nonmajority bargaining order entered at bar fails to fulfill either criterion. That the Board's order is not designed or intended to restore the status quo ante is obvious. Because there has never been a freely chosen majority representative in the circumstances at bar, the Board's order goes significantly beyond the reestablishment of preexisting conditions.

Beyond the status quo ante question, the order here exceeds the Board's authority because it is inconsistent with the Act's objective of promoting freedom of choice. In *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), the Court confronted an analogous situation. There, the Board employed its remedial authority to order an employer to accept a dues check off provision as a part of a collective bargaining arrangement; but this Court held that the Board's remedial authorty did not extend so far:

> The Board's remedial powers under §10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under govern-

> mental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

397 U.S. at 108 (footnotes omitted).

The fundamental principle of the Act that the Court deemed sufficient to override the Board's remedial authority in *Porter*—freedom of contract—stands in *pari materia* to the principle implicated at bar—freedom of choice. The Court's conclusion that a cardinal tenet of the Act cannot be violated in the name of an inovative remedy designed to foster the Act's objectives precludes enforcement of the bargaining order entered here. Although less drastic sanctions may not meet with the approval of a slim majority of the Board, the authority to impose the remedy at issue must eminate from Congress.[7]

D. The Order Transcends The Board's Role In The Administration Of National Labor Policy

The comprehensive statutory scheme that governs labor relations in this country grew out of strife and turmoil in the workplace which spilled across the lines of interstate commerce. To calm the disturbances that had adversley affected the productive capacity of the nation, Congress provided workers with a federally protected right to select representatives of their choice to bargain collectively on matters concerning their employment. "The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement." *H.K. Porter v NLRB*, 397 U.S. 99, 103 (1970).

To breathe life into the paper guarantees embodied in the Act, Congress created the NLRB. Notwithstanding the wide variety of functions and broad remedial authority that the Act

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[7] "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy ...." Colgate Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 363 (1949); *see* Linden-Lumber Division v. NLRB, 419 U.S. 301, 317 (1974).

reposes in the Board, there is nothing in the legislative language that endows the Board with direct involvement in the collective bargaining process.

The remedial powers entrusted to the Board, ranging from cease and desist orders to injunctive authority, are meaningful and effective. Those powers may be invoked to compel adherence to the rules governing collective bargaining, but may not be employed to inject the Board into the bargaining process. Thus, the Act's concern for freedom of contract precludes the Board from invoking its remedial authority to control the terms of a bargaining agreement. By virtue of the same principle, the Act's concern for employees' freedom of choice precludes the Board from invoking its remedial authority to select a particular bargaining representative.

In this case, the Board injected itself into the process by selecting a bargaining representative in derrogation of its obligation to protect freedom of choice.[8] It has shown favoritism by summarily elevating a representative that was neither elected nor supported by a majority of those on whose behalf it is authorized to negotiate. For the Board to arrogate unto itself the power to issue nonmajority bargaining orders "where the actual desires of the majority may be easily and readily ascertained at any time, would be to force men into unions and into dealing with their employers through unions contrary to the employees' own wishes. The statute has no such purpose." *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 697-98 (1944) (Rutledge, J., dissenting).

Because the authority to enter a nonmajority bargaining order unnecessarily injects the Board into the collective bargaining process, the D. C. Circuit struck an appropriate balance in concluding that an order of this nature is beyond the Board's remedial authority.

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[8] "[N]ot only has their employer trampled on their rights, but now the federal government in distant Washington has imposed its will on the employees. In many ways, the destruction of employee choice by the Board is more serious than the employer's unlawful conduct because the new transgressor, the Board, is the governmental agency that is supposed to protect employee freedom of choice." Hunter, *Conair: Minority Bargaining Orders Usher In 1984 at NLRB*, 33 Labor L.J. 571, 579 (1982).

CONCLUSION

For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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